United States Court of Appeals for the Second Circuit



APPELLEE'S BRIEF

75-7332

In The

United States Court of Appeals

For The Second Circuit

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD. IN BANKRUPTCY PROCEEDINGS,

Plaintiff-Appellee,

VS.

CLARK-SCHWEBEL FIBER GLASS CORPORATION

and

BURLINGTON INDUSTRIES, INC.,

Defendants-Appellants ATES COURT OF ALL

On Appeal from the United States District Court & the Southern District of New York

THE OCT 3 0 1975

BRIEF FOR PLAINTIFF-APPELLE

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- 1. Is the evidence of Defendants' motives, their opportunities to conspire, their frequent contacts and communications, their threats, refusals to process orders, termination of credit and other harmful actions against Plaintiff contrary to their prior practice of giving Plaintiff extended credit and related terms, sufficient to support the jury's factual determination that Defendants conspired in violation of Section 1 of the Sherman Act?
- 2. Is the proof of Plaintiff's reliance upon BURLINGTON and CLARK-SCHWEBEL for its primary fabrics and the inability to secure those fabrics, the admission by Defendants that Plaintiff could not operate without their extended credit terms, the fact that Plaintiff was unable to fill existing and future orders and contracts, and its resulting loss of sales sufficient evidence to support the jury's factual determination that the Defendants' conspiracy was a proximate cause of Plaintiff's damage?
- 3. Were Plaintiff's financial statements for the period from 1958 through 1966, documents showing unfilled existing and future orders and contracts, the testimony of expert witnesses and an employee of Plaintiff as to sales forecasts and income projections, sufficient evidence to support the jury's award of damages?

- 4. Were there any errors in the charge to the jury so prejudicial to Defendents as to require a new trial?
- 5. Were there any errors in the conduct of the trial so prejudicial to Defendants as to require a new trial, especially in view of Defendants' blatant attempts to prejudice the jury against Plaintiff's principal witness POWRIE?

STATEMENT OF THE CASE

The Amended Complaint in this action which was commenced in December, 1966, by Plaintiffs TEXTURA, LTD.* (as used herein "TEXTURA" refers to TEXTURA, LTD. and its predecessor GLASS FABRICS, INC.), its wholly-owned subsidiary FENESTRA FABRICS, INC. ("FENESTRA") and MALCOLM G. POWRIE ("POWRIE"), TEXTURA'S President, and principal stockholder and operating officer, sought the recovery of treble damages pursuant to Section 4 of the Clayton Act (15 U.S.C. §15) and charged Defendants CLARK-SCHWEBEL FIBERGLASS CORPORATION ("CLARK-SCHWEBEL"), BURLINGTON INDUSTRIES, INC. ("BURLINGTON") and J. P. STEVENS & COMPANY, INC. ("STEVENS") with conspiring to drive Plaintiffs out of business and with conspiring to fix the prices of decorative and industrial fiberglass fabrics sold to TEXTURA in violation of Section 1 of the Sherman Act (15 U.S.C. §1). The Amer 'ed Complaint also contained allegations that Defendants had violated Section 2 of the Sherman Act (15 U.S.C. §2) and Section 2 of the Robinson-Patman Act (15 U.S.C. \$13).

In December of 1970, the same month that Plaintiffs filed their "Note Of Issue And Statement Of Readiness" Defen-

^{*}TEXTURA was adjudicated a bankrupt in March, 1967. CARLYLE MICHEIMAN, TEXTURA'S bankruptcy trustee was substituted as Plaintiff in lieu of TEXTURA, following a hearing before the Bankruptcy Court in California at which time Defendants jointly opposed the appointment of TEXTURA'S counsel as special counsel to prosecute this action.

dants' served virtually identical counterclaims and answers to the Amended Complaint which had been served in February, 1968.

The counterclaims charged POWRIE and VERNES F. GRAFSTROM (a stockholder of TEXTURA who was named as a Defendant on the Counterclaim) with fraud and conspiracy to induce the Defendants to extend credit to TEXTURA by false representations and non-disclosure with respect to the financial condition of TEXTURA.

After being respectively assigned for trial to Judges PIERCE, CARTER and CONNOR during the period from February 1971 to July of 1974, the case was assigned for trial to Judge TENNEY. Prior to trial, fearing that the unfounded allegations of fraud in the counterclaims were designed to prejudice the jury against POWRIE, their chief witness, Plaintiffs moved for an Order directing a separate trial of the counterclaims or in the alternative directing that proof as to the counterclaims be submitted after Plaintiffs' case in chief had been completed. Defendants similarly moved for a separate trial of Plaintiffs' industrial price-fixing claim. Judge Tenney denied both motions.

The trial in this action began on October 15, 1974 and consumed 17 days during which Plaintiffs presented 13 live witnesses, including 7 hostile witnesses and 2 experts who testified as to damages. Plaintiffs read from the depositions of 13 witnesses, including 8 hostile witnesses, and introduced into evidence approximately 250 exhibits. Defendants produced only 1 witness in their case in chief, relying principally on cross-examination of the wit-

nesses called by Plaintiffs. Defendants introduced approximately 60 exhibits in evidence.

At the close of Plaintiffs' case, Defendants moved "for judgment of dismissal of the Complaint on the traditional ground that there is insufficient evidence on which to send any part of this case to the jury" [Tr. 1944; App.]. Plaintiffs agreed to dismiss their claims pursuant to Section 2 of the Sherman Act and Section 2 of the Robinson-Patman Act. The Court granted Defendants' motion with respect to Plaintiffs' charges of fixing the prices of decorative fiberglass fabrics and dismissed the claim of FENESTRA for lack of standing while allowing POWRIE'S claims and TEXTURA'S claims with respect to the conspiracy to drive it out of business and to fix industrial prices to go to the jury.

The jury deliberated for 5 days with the aid of written questions submitted by the Court pursuant to Rule 49, F.R.C.P. which are, together with the jury's answers, set forth as Appendix A to this Brief. The jury returned verdicts for TEXTURA in the amount of \$531,617.00 (before trebling) against BURLINGTON and CLARK-SCHWEBEL on the main claim and in a nominal amount agains STEVENS and BURLINGTON on the industrial price-fixing claim while also finding that POWRIE had not sustained any damages and that no Plaintiff, or GRAFSTROM, had committed a fraud upon Defendants.

Before the afternoon session of the last day of the trial, Chief Judge Edelstein called counsel for all parties in the

robing room and stated:

"Gentlemen, shortly before Judge Tenney was to resume the afternoon session of the trial, a matter came to his attention which required his urgent and immediate response and, accordingly, he will not be able to continue this afternoon and it is very unlikely that he will be able to continue tomorrow, and I would say the earliest he would be able to resume this trial would be on Monday morning.

Accordingly, it is my intention to have the jury brought into the box and to explain in precisely the same terms I have just now done what the situation is and that we will be recessed until Monday morning.

Is there anything you wish to add?" [Tr. 2067; App.].

All parties consented to Judge Edelstein's presiding during the completion of the testimony and cross-examination of Defendants' sole witness and the introduction of the remaining documentary evidence [Tr. 2062-2070; App.]. Judge Tenney returned, presided during the summations and charged the jury the following day. Chief Judge Edelstein presided during the few instances that the jury required judicial assistance while deliberating. At no time did Defendants ever complain about Chief Judge Edelstein substituting for Judge Tenney*.

After judgment was entered Defendants renewed their motion for a directed verdict and moved for judgment notwithstanding the verdict and for a new trial. POWRIE moved for a new trial

^{*}The references in BURLINGTON'S Brief (fm. 2) to Judge Tenney's "seemingly bizarre conduct" and CLARK-SCHWEBEL'S allegation (at page 6 of its Brief) that Judge Tenney "in an effort to get through" limited "without warning" the summations of counsel for BURLINGTON and CLARK-SCHWEBEL constitute a totally unfounded, unprofessional and personal attack upon the Court below.

and TEXTURA moved for an award of attorneys fees. In its opinion [App.] the Court set an evidentiary hearing for fees* and denied all the other motions. The subject Appeal and Post-Trial Motions of CLARK-SCHWEBEL and BURLINGTON do not involve the dismissal of their counterclaims, the judgment against BURLINGTON on Plaintiffs' industrial fabric price fixing claim, or the award of attorneys fees.

^{*}In its Opinion of September 9, 1975, the Court awarded TEXTURA'S attorneys fees of \$325,000 against CLARK-SCHWEBEL and BURLINGTON pursuant to Section 4 of the Clayton Act.

STATEMENT OF FACTS

I. THE PARTIES.

A. TEYTURA And The History Of Its Business.

TEXTURA'S predecessor was organized in 1954 as a small

California converter* of fiberglass fabric [Tr. 82; App.],

at that time a new product [Tr. 78; App.]. The company sold

drapery fabrics in the early years in the traditional marketing

pattern to jobbers who would then resell them to decorators [Tr.

82, 82A, 85, 196; App.]. In 1958 MALCOLM POWRIE

began managing the company. Frustrated with the non-acceptance by

decorators, and lack of enthusiasm from the traditional outlets for

the new fabric [Tr. 84, 85; App.], POWRIE began to look to

market the fabric in industrial and commercial areas [Tr. 84; App.

]. Thus after initially exploring the market of hospital cubicle curtains [Tr. 84-85; App.], POWRIE developed the notion of selling "in a different fashion" by "buying in large quantities, committing ... far in advance to the mills [i.e. the Defendants] ... [selling] large quantities, one color, one weave to one installation ..." [Tr. 86; App.]. Coincidentally with this conception came the building boom in high rise office buildings offering a new market for it [Tr. 86-87; App.]. Building owners had traditionally not purchased window coverings other than venetian blinds, leaving the choice of draperies, if any, to

^{*}A converter "converts" and processes raw (greige) fabric into finished drapery materials.

the individual tenant [Tr. 195; App.]. TEXTURA under POWRIE'S direction sought as a subcontractor to sell and install the fabric and related hardware directly to the building owner or his general contractor. [Tr. 195-197; App.]. TEXTURA sold and installed the draperies in the first building in the United States where the owner purchased the draperies rather than the tenants [Tr. 195, 196; App.].

TEXTURA'S marketing methods of selling direct to building owners in the construction of the building skipped over the two traditional profit levels of fabric jobber and decorator, who had sold the fabrics to tenants of such buildings [Tr.195-196; App. The resulting complaints from decorators and jobbers caused TEXTURA to form in 1960 a subsidiary, FENESTRA FABRICS, to bid on contracts for the installation of draperies and related hardware on buildings where a TEXTURA fabric had been specified - theoretically allowing competition on installation although the fabric would be supplied by TEXTURA [Tr. 116, 192-197; App.].

1.

Another problem posed by the sale of fiberglass fabrics to high rise office buildings--especially in the light of the increased use of glass wall construction [Tr. 87; App.]--was that of the cost of air conditioning. Specific technical information had been developed for venetian blinds, TEXTURA'S chief competition for this business, called shading coefficient factors, which enabled architects and engineers to determine the number of air conditioning tons needed to cool a building if blinds were to be used [Tr. 88; App.]. Since no comparable data existed for fiberglass draperies,

TEXTURA was hindered in its efforts to sell to building coners (Ibid).

To enable itself to compete, TEXTURA first went to U.S. Testing Company and was able to get some primitive information to enable it to talk to architects and engineers [Tr. 88-89; App. Later it utilized tests made by the American Society Of Heating And Refrigeration Engineers to obtain more specific data [Tr. 88-90;], but was still handicapped by its inability to supply App. specific data on the specific fabrics marketed by it (and supplied by Defendants) [Tr. 90, 194; App.] To answer this need, TEXTURA employed the Yellott Solar Energy Laboratory to test over 100 fabrics so that it could advise architects and engineers the specific shading coefficient of the specific fiberglass fabric marketed by it. An "Engineer's Guide" containing this breakthrough information which resulted from the Yellott tests and touting the resultant advantages of fiberglass draperies over venetian blinds as well as advertising its architectural traverse track and drapery hardware was published by TEXTURA in 1965 [PX 1; App.].

By the third quarter of 1962, JACK SCHWEBEL ("SCHWEBEL") could write in a memorandum that "...a substantial percentage of MCMRIE'S business is contract installation in large office buildings and institutions" [PX57; App.].

TEXTURA'S method of doing business was as follows: its sales people would approach an architect, engineer or general contractor of a contemplated high rise building perhaps as far as two

years in advance of making the sale, in order to get the engineer to specify a TEXTURA drapery fabric for the building [Tr.192-194; App.

]. Once the engineer specified the fabric, TEXTURA was assured of supplying the material [Tr. 193; App.]; one reason for this assurance was that fiberglass fabric styles woven by Defendants for TEXTURA were under "style confinement"--that is an agreement not to manufacture the style for anyone else [Tr. 338-339; App.].

Indeed, fabrics were developed by TE TURA with Defendants co suit special needs demanded by the engineers, which then became part of TEXTURA'S product line, marketed as a TEXTURA fabric [Tr. 346, 558-560; PX 583; App.]. One such fabric was the BURLINGTON fabric "Crown" which became a standard TEXTURA fabric and its biggest seller from any source [Tr. 346-347; App.

-]. Another standard fabric was BURLINGTON'S "Satin Boucle" [Tr. 347; App.]; these two items being, according to BURLING-TON'S sales representative ERSKINE "the biggest items we have had with this account, with 94622 [Satin Boucle] being more than ten years old and 6011 [Crown] about seven years old." [PX 122; App.
-]. Examples of CLARK-SCHWEBEL woven styles which became part of the TEXTURA product line were "Morro", "Homespun" and "Civic" [PX 815; App.]. Substantial money, time and effort were expended by TEXTURA in establishing a weave style in volume as part of its product line. [PX 815; App.].

Once TEXTURA had obtained a specification of the fabric on the building, it would bid on the contract for the installation of the

fabric, which except in a rare case, it obtained [Tr. 193, 560-561; App.]. It would then perform the function of installing the draperies, including the traverse track and drapery hardware.

[Tr. 194; App. ; see PX 1]*.

TEXTURA'S entry into the construction business placed it at the mercy of late paying general contractors [Tr. 95-56, 154; App.]. This was recognized by SCHWEBEL in 1962 when he wrote that it was "usually difficult for POWRIE to collect his receivables on these contracts for [installation in large office buildings and institutions] until they are fully completed." [PX 57; App.].

Another aspect of TEXTURA'S business which made it unique among the defendant mills' customers was that it bought greige fabric and finished its own goods [Tr. 95; App.] through a converter, as opposed to buying the finished goods. In fact TEXTURA was "the only finisher of fiberglass outside [of defendants]" [Tr. 95, 156; App.]. In addition, TEXTURA was, as a California-based operation, distant from the Defendants' weaving mills, which are located on the East Coast [Tr. 95, 154; App.].

As a result of the payment delays inherent in its new marketing approach, delays in obtaining the goods due to the other factors mentioned, and thin capitalization, TEXTURA early sought aid from the Defendants in the form of extensions of credit over and above the normal terms of credit extended by the mills to their customers, plus provisions for storing the woven goods without invoicing until TEX*See, e.g. PX 587, contract for "Window Draperies and Track Installation", obligating TEXTURA to finish "all labor, material plant work, equipment, services and related items for a complete drapery installation in the "One Wilshire Building" [App.].

TURA was ready to call them out for a job. Since TEXTURA might have had a fabric specified on a building as much as 2 years in advance of the actual construction of the building and would therefore have to commit to purchase far in advance from the Defendants, its need for such terms was obvious. These concessions were granted, orally, by the Defendants in return for a requirement that TEXTURA "place large quantities when [it] placed a contract". [Tr. 154, 155, 156, 158, 161-168; Tr. 1357-1358; see PX 806, DX BT, Tr. 982, DX AY, PX 55, PX 56, PX 57, PX 59, PX 146; App.

Although both BURLINGTON and CLARK-SCHWEBEL seek to deny their existence on this appeal [BURLINGTON Brief, pp. 13-14; CLARK-SCHWEBEL Brief, pp. 11-12], the existence of these terms and TEX-TURA'S dependence on them was conceded by Defendants in summation. [Tr. 2174; App.].

As a result of this arrangement, from 1961 or 1962 until the period of the conspiracy, TEXTURA paid its bills to BURLING-TON on an average of at least 90 days, extending up to four, five and six months in some cases [PX 806; App.]*

^{*}This extract from BURLINGTON'S files shows the date that invoices from BURLINGTON to TEXTURA were paid. That this was not merely a matter of "lateness", as alleged by BURLINGTON ("URLINGTON Brief, pp. 13-14) was confirmed by ERSKINE, BURLINGTON'S sales representative [Tr. 1357-1358; App.]:

[&]quot;Q. What did you learn about any special terms given to TEXTURA or GLASS FABRICS or Mr. POWRIE?

A. That such arrangements periodically were made. To my recollection, they were changed on various occasions from - they were always greater - I'm not sure of always. Probably always greater than 30 days. And my recollection is that on some occasions he had arrangements for payment in 90 days, in some cases he had arrangements for payment in 120 days."

without BURLINGTON taking action other than pressing, unsuccessfully except in 1965, for a guarantee and encouraging POWRIE, again largely unsuccessfully, to reduce the time of payments.

[BURLINGTON Brief, pp. 13-16]. The invoice terms (net 30; net 30 plus 30) were never applied to TEXTURA [Tr. 164; App.].

The same practice prevailed with CLARK-SCHWEBEL, again without serious alteration from 1961 to the end of 1965; TEXTURA "always paid" CLARK-SCHWEBEL in a fashion creating past due maturities of 150 to 180 days, which did not "concern" SCHWEBEL [PX 146; App.]*.

Substantial payables to BURLINGTON and CLARK-SCHWEBEL built up during the years that the extended terms were in effect:

YEAR	BURLING	TON**	CLARK-SCH	WEBEL***
	LOW	HIGH	LOW	HIGH
1962	\$32,000	\$79,000	NO FIGUR	ES
1963	\$38,000	\$85,000	\$11,000	\$69,000
1964	\$23,000	\$90,000	\$ 8,000	\$40,000
1965	\$24,000	\$72,000	\$ 7,000	\$78,000.

Keeping the company as a primarily West Coast operation
[Tr. 207; App.], TEXTURA experienced two profitable years with

^{*}SCHWEBEL confirmed the "hold-until-call" aspect of this arrangement in his testimony [Tr. 982; App.]. NORDHEIM impliedly admitted the existence of the extented terms arrangement in a letter where he stated that TEXTURA would not get "extra dating" on a bill for freight charges, implying that it did with its regular invoices [PX 59; App.]. See also PX 55 - POWRIE letter to CLARK dated September 14, 1961 - raising the question of "whether our being billed for this material without having called it out conforms to our understanding" and stating "we would like to have the same arrangement with CLARK-SCHWEBEL that we have with STEVENS and HESS [BURLINGTON], and reply of SCHWEBEL [PX 56; App.].
**PX 806; DX BT; App.

^{***}PX 859; App. . CLARK-SCHWEBEL began selling decorative fiberglass fabrics in 1961.

its new marketing techniques [Tr. 115; App.]:

YEAR	PROFITS	SALES
1962	\$40,091	\$ 889,167 [PX13; App.]
1963	\$49,285	\$1,108,687 [PX15; App.].

Having thus tested the market successfully on a local basis, POWRIE was sure GLASS FABRICS was "on the right track" and undertook to vastly expand the company in 1964 and 1965 to enable it to penetrate the same market on a national basis. [Tr. 115-116;]. Pursuant to this program, GLASS FABRICS in the first quarter of 1964 began to open offices and appoint representatives in major U. S. cities. It opened offices in New York and Chicago and appointed additional representatives in most principal cities including San Francisco, Minneapolis and Kansas City. [Tr. 208-209; App.]. Approximately 17 additional sales people ere added to the TEXTURA sales staff [Tr. 210; App.]. TEXTURA had by May of 1965 some "25 new outlets" (Ibid), "three men in New York and two men in Chicago and officers in both cities and ... 33 salesmen" [Tr. 120; App.]. Technical operations, space and sales lead system improvements were made over the years 1965 and 1966 [Tr. 210-214; App. 1.

Because of increase in expenses owing to expansion (increased inventory purchases and operating expenses with no increase of sales [PX 20; App.], TEXTURA "sustained heavy losses ... by design" in 1964 [Tr. 118; App.]. At year end a \$114,000 loss was recorded [PX 20; App.]. In 1965, by which time TEXTURA had the Engineer's Guide [PX 1; App.] with specific shading coefficient

data at its disposal, with the Yellott Solor Energy Laboratory under contract for further such testing [Tr. 116; App.], a national sales staff, offices or representatives in major U. S. cities, and a new fabrication operation [Tr. 210-214; App.], TEXTURA undertook to consolidate the expansion and make TEXTURA more efficient [Tr. 120, App.]. As a result, in 1965 TEXTURA'S sales shot up to \$1,412,986, an increase of 33% over the previous year while losses were reduced to \$31,195. Although operating expenses attributable to expansion continued to climb [PX 36; App.

], a general manager, ALLEN FRIEDMAN ("FRIEDMAN"), was hired for the year 1965 [Tr. 120; App.] to organize the business as an administrator and to effect cost efficiencies in implementation of the expansion [Tr. 1779, 1780, 1786-1788; App.

].

One undertaking by FRIEDMAN was to prepare projections of TEXTURA'S results for 1966 [PX 48; 1, p.], involving "months of work". [Tr. 1818; App.]. Cost efficiencies were effected, including letting "a lot of people go" in December 1965 [Tr. 1818; App.].

FRIEDMAN testified as to TEXTURA'S successful efforts to consolidate the expansion:

- "Q. You spoke earlier about the cash flow situation in Textura. What sort of a flow picture was it in 1965?
- A. Well, we were spending cash in order to build the organization and to develop the various sun control, shade control factors. And the results of those expenses were being borne on a current basis. And the fruits of those labors were not going to be appreciated until possibly a year later. And therefore our cash position was a very tight position.

- Q. But you were anticipating an increase in sales?
- A. Yes.
- Q. And what did you base that prediction on?
- A. Well, first of all, having the organization to sell the products, and the ability internally to handle those sales, and all of that was basically, revolved around the publication of the literature. And having well-manned offices in those areas where we thought it was necessary." [Tr. 1793-1796; App.].

By the time he left at the end of 1965, FRIEDMAN testified, TEXTURA was in a position to succeed and that if sales came up to the anticipated projections, the company would make a great deal of money" [Tr. 1814; App.] and "would no lenger have the cash problem [it] had lived with" (Ibid.)

B. The Defendants And Their Relationship To TEXTURA

BURLINGTON, CLARK-SCHWEBEL and STEVENS were the only significant producers of decorative fiberglass fabrics in the county and the only weaving sources for TEXTURA [Tr. 129, 1592; App.

]. BURLINGTON was overwhelmingly TEXTURA'S major supplier, followed by STEVENS and CLARK-SCHWEBEL*. However, even though CLARK-SCHWEBEL was a late (1961) entrant into this concentrated industry, by 1965 it had supplanted STEVENS as TEXTURA'S second largest supplier [PX 884; Tr. 1799; App.] and in 1965 BURLINGTON, through its HESS GOLDSMITH (decorative fiberglass) Division, and CLARK-SCHWEBEL supplied 70% of TEXTURA'S purchases from the three Defendants [See PX 884; App.]. This was consistent with the growth

^{*}Over the six years up to and including the year of the conspiracy BURLINGTON supplied TEXTURA with \$1,076,566 worth of fiberglass fabrics; STEVENS supplied \$549,694 over the same period and CLARK-SCHWEBEL \$367,950 [PX 884; App.].

of TEXTURA'S contract business [See PX 57; App.] as these two suppliers were predominant in supplying TEXTURA'S needs in that field. STEVENS basically supplied fabrics for TEXTURA'S less important decorator sales [Tr. 660; App.] and thus relatively had faded out of the picture by 1966 [PX 884; App.].

CLARK-SCHWEBEL was formed in 1960 by RAYMOND F. CLARK, the former Executive Vice-President of BURLINGTON'S HESS GOLDSMITH DIVISION, and JACK P. SCHWEBEL, the former manager of the Industrial Glass Fabrics Division of STEVENS. [Tr. 883-886; App.].

CLARK had negotiated the extended terms arrangement with TEXTURA both for BURLINGTON [Tr. 153-155; App.] when he headed their decorative division and for CLARK-SCHWEBEL as a principal of that company. [Tr. 164-167; App.]. As POWRIE testified:

"At the time I placed the order, the question of the terms came up. He, of course, had been president of Burlington's Division and knew the terms, and I had arrived at these terms with him in 1958. It was not a detailed discussion put in writing or marking any detail, but he understood the terms. But we did one more time "view them, the fact that I would place an order only if they could hold the goods for me and not deliver them until I ordered them out, secondly, when I did order them out that I would have extended terms from the date of their invoicing to me, and those terms were to be around four months' time." [Tr. 166-167; App.].

RAYMOND NORDHEIM was Vice-President of CLARK-SCHWEBEL [Tr. 1483; App.]. He functioned as the head of CLARK-SCHWEBEL'S decorative division [Tr. 1480; App.] and was responsible for credit and sales on all decorative accounts, including TEXTURA [Tr. 1491; App.]. SCHWEBEL, whose background was in the industrial glass

fabric side of the business [Tr. 883; App.], assumed the presidency of the company after CLARK'S death in 1964 [Tr. 883; App.].

The credit department of BURLINGTON consisted of CHARLES KELLY, who was directly responsible for the TEXTURA account, IRWIN SCHUTZ, his superior and LARRY DONNELLY and JACK CANN, the West Coast credit men. The sales department or those executives responsible in this area were principally WILLIAM COLTON, Vice-President and subsequently President of BURLINGTON'S decorative fabric division, LUD VOLLERS, sales manager and subsequently Vice-President of that division [Tr. 1573-1575; App.] and RAY CLARK prior to his eaving the company. PAUL ERSKINE was BURLINGTON'S West Coast sales representative, a former employee who had set up his own business as a manufacturers' representative [Tr. 1576-1577; App.].

II. THE CONSPIRACY.

A. Background.

KELLY (BURLINGTON) and NORDHEIM (CLARK-SCHWEBEL) regularly exchanged information concerning common customers. NORDHEIM
testified that "whenever there was a problem with an account ...
it was [his] regular practice to discuss that account with other
people whom [he] knew also to be selling" [Tr. 1527; App.]
or "who might have been having similar credit problems" [Tr. 1528;
pp.]. He testified that this was "unequivocally" his practice;

that he "regularly" did so, "whenever it happened" and that he followed this practice with KELLY of BURLINGTON [Tr. 1527-1528; App.]
but not with STEVENS [Tr. 1527; App.].* This was done as a "kind of defensive measure". [Tr. 1528; App.].

As pointed out supra, both BURLINGTON and CLARK-SCHWEBEL had unique, and similar, credit arrangements with TEXTURA which distinguished this customer from the balance of their customers. Those communications between KELLY of BURLINGTON, and NORDHEIM of CLARK-SCHWEBEL evidenced by memoranda from Defendant BURLINGTON'S files, suggest an implicit agreement to formulate common credit policy between the two companies on this "unique" account. [Tr. 155-156; App.]. NORDHEIM began talking to KELLY about the account at least as early as June 1965, at which time after complaining about the account, NORDHEIM recommended to KELLY that "we play the account slowly" [PX 81; App.]. Subsequent communications suggest a similar agreement as to the coordination of credit policy regarding TEXTURA between CLARK-SCHWEBEL and BURL-INGTON. In December 1965, after hearing from NORDHEIM that CLARK-SCHWEBEL was holding up shipments to TEXTURA, KELLY, without apparently checking further into the matter, immediately advised DONNELLY, BURLINGTON'S West Coast credit man, to hold up shipments while the account was past due on 60 day terms [PX 91; App.]. On January 13, 1966 [PX 96; App.] NORDHETM again called KELLY with reference to holding up TEXTURA shipments and stated that he would "like to compare notes" with DONNELLY. KELLY told NORDHEIM that he "did not

^{*}Since the jury placed great importance on the testimony of NORDHEIM, it may well have acquitted STEVENS on this ground alone. [See CLARK-SCHWEBEL Brief, p.35].

know if BURLINGTON was presently holding up shipments" in that the account was handled from DONNELLY'S office. He then suggested to DONNELLY that once DONNELLY and NORDHEIM had discussed the matter in Los Angeles that DONNELLY let KELLY have his comments on the past-due status and "what was doing with regard to new shipments" in the TEXTURA account [PX 96; App.].

B. Motive.

BURLINGTON

In a conversation referring to TEXTURA'S national expansion in 1964 [Tr. 201: App.] COLTON of BURLINGTON stated to POWRIE that "if he had the ability to do so he would not sell us (TEXTURA) any further" because BURLINGTON had "been getting so many complaints from our other customers that if we had the option we would not take you on today as a converter and if we could figure out a way how to do it we would no longer sell you." [Tr. 202; App.

]. COLTON especially identified the complaining customers as
THORTEL and QUALFAB [Tr. 203; App.]. QUALFAB purchased "close
to 3 million" dollars worth of fabric annually from BURLINGTON
in 1964 and 1965. It continued purchasing at near that level in
1966 ("two and a half, two and three quarter million") [Tr. 1828;
App.], more than fifteen times the amount of BURLINGTON'S
annual sales to TEXTURA [PX 884; App.]. COLTON had been apprised
of the complaints by VOLLERS [Tr. 1602, 1827; App.]. These
complaints, which VOLLERS testified "if [he] stored ... in [his] mind,
... [he wouldn't] have room for anything else" [Tr. 1826; App.]
were received by him all through the years 1962 to 1966 [Tr. 1827;

App.] and continued in that latter year [Tr. 1829; App.

].

VOLLERS testified that the practices of TEXTURA which gave rise to the complaints were its direct sales to contractors [Tr. 1824-1826; App.], giving it a competitive edge over those of BURLINGTON'S other customers who sold through jobbers in the same territory covered by TEXTURA [Tr. 1826, 1829; App.]:

"...Where we [BURLINGTON] had pure converters who were distributing through jobbers, because we were selling goods at approximately the same prices, style for style, to GLASS FABRICS-TEXTURA, and they were going directly to jobs, it might be somewhat difficult for our regular converters to sell to a jobber who, in turn, was going after that business, for everybody to make a profit." [Tr. 1826; App.].

I [VOLLERS] occasionally received a gripe from these people, or a complaint from these people, regarding they had gone to the West Coast to attempt to sell a jobber some goods or what have you, and found that they were being - that they found it very difficult to merchandise the fabrics they bought from me the high style fabrics, in competition with TEXTURA. [Tr. 1829; App.].

sentative of OWENS CORNING FIBERGLASS, the supplier of fiberglass yarn to all weavers, "about TEXTURA'S selling methods" [Tr. 1360; App.]. KAHN and ERSKINE felt that a market for sale through jobbers (the middleman in the traditional method of distribution) was not being fulfilled on account of TEXTURA'S concentration on direct sales [Tr. 1360-1361; App.]. ERSKINE had communicated to GOTTSHALK of the sales department of BURLINGTON his and KAHN'S interest in sales to "true converters" who would market to "decorative jobbers and retail stores of the West". [PX 90; App.].

Up until that time, TEXTURA was the "only decorative account [BURLINGTON] ... [had] on the [West] Coast ..." [DX AZ;
App.]. Immediately following TEXTURA'S demise, however,
SOFT FLEX FABRICS, INC. was organized by ERSKINE, CANN and others
"to provide an outlet for fabrics formerly reaching the market
through TEXTURA" [PX 384; App.] which company was committed
to eliminating the direct selling practices that QUALFAB and
others had found objectionable. [PX 228, Tr. 1360-1361, 14731475; App.]. As SOFT FLEX' President, GUMBINER, testified, the company intended to sell "through
the jobbers, the established jobbers, and not sell any job direct.
Or not even be in the contract business ourselves". [Tr. 1473;
App.].

In addition, TEXTURA'S own complaints concerning the poor quality of BURLINGTON'S fabrics Crown and Satin Boucle were pressed with more and more frequency in early 1966 [PX 100, 101; App.].

CLARK-SCHWEBEL

Following the death of RAY CLARK in 1969, CLARK-SCHWEBEL decided to "tighten up on everything ... on shipments, quality, credit, everything" [Tr. 1485; App.], subsequent to which time, no adjustments for poor quality fabrics were given to TEXTURA by CLARK-SCHWEBEL [Tr. 235; App.] CLARK-SCHWEBEL begget to press TEXTURA more urgently to pay its bills within shorter

periods of time [DX V, DX Y, PX 582; App.] and to take in goods warehoused for what CLARK-SCHWEBEL thought was an inordinate length of time [DX AE; App.], in short to eliminate the favored terms negotiated by POWRIE with CLARK. In this connection, NORDHEIM advised POWRIE to "stay away from [JACK] SCHWEBEL" commenting that "if RAY CLARK were still alive this [requirement to take in more goods] would not have been a problem". [DX AE; App.].

Although justified, TEXTURA'S complaints regarding the quality of CLARK-SCHWEBEL'S fabrics, which it pressed with increasing frequency toward the end of 1965, beginning of 1966

[PX 815, 102, 104A; App.] angered SCHWEBEL [Tr. 981; App.]. NORDHEIM testified that the volume of complaints made by TEXTURA was "inordinately high" compared with complaints made by its other customers [Tr. 1488; App.]. SCHWEBEL testified that they were substantially more and, that he "was not happy about it" [Tr. 981; App.].

C. The Events Of March To June 1966.

When TEXTURA'S claims in regard to CLARK-SCHWEBEL'S admittedly poor fabric were flagrantly disregarded by NORDHEIM*

TEXTURA threatened to take a credit in the amount of \$30,000 [FX 104C; App.]. Allegedly in response to this but consistent with the predetermined policy to eliminate TEXTURA'S special ad-

^{*}On January 17, 1966 NORDHEIM examined the fabrics delivered to TEXTURA and admitted that they were "shit" [Tr. 284, 1510-1511; App.]. On February 11, POWRIE wrote NORDHEIM enclosing a panel of the defective Spartan fabric and made a formal claim and request for credit in the amount of \$30,000 [PX 104A; App.]. NORDHEIM failed to respond.

vantages, NORDHEIM in March and April 1966 terminated TEXTURA'S credit, [Tr. 984; App.] stopped shipments to TEXTURA, [PX 108; App.] refused to process new orders, [PX 108; App.], and sent TEXTURA invoices for some \$80,000 worth of goods over and above the amount owing in respect of delivered goods [Tr. 302, 303, PX 104D; App.], including invoices for goods not yet woven. [Tr. 1512; App.] TEXTURA returned the invoices stating that the invoicing for goods not called out did not conform to the parties' understanding under the extended terms agreement [PX 824; App.].

CLARK-SCHWEBEL had never before invoiced TEXTURA for ods held in its warehouse pursuant to their historical arrangement, nor had it ever before placed i n a cash basis [Tr. 982-984;]. On March 18, 1966 POWRIE advised KELLY of BURLINGTON that he "[had] a dispute going with CLARK-SCHWEBEL concerning quality and [felt] that RAY NORDHEIM [was] giving him a run-around" and that he was claiming "an adjustment of \$25/30,000 on [a job] for which CLARK-SCHWEBEL supplied all fabrics" [DX BF; App.]. In this same memorandum from BURLINGTON'S files, KELLY noted that BURLINGTON had "been following, without success, in an attempt to obtain a new guaranty" which would "include Mr. POWRIE'S signature", - that POWRIE had initially indicated he would give it, but "now asks us to forego this". [DX BF; App.] NORDHEIM, it will be recalled, called KELLY on a regular basis whenever there was a problem with a mutual account. He had admittedly called KELLY in the prior December and January when a question of holding up shipments to TEXTURA arose.

The evidence compels the conclusion that KELLY (the sole communicant NORDHEIM conferred with on such a basis) would have been advised and consulted by NORDHEIM when such a dramatic move was taken, or vice versa.

NORDHEIM shortly thereafter relaxed CLARK-SCHWEBEL'S refusal to she fabric to TEXTURA by permitting TEXTURA to call out the warehoused goods for cash [Tr. 310; App.]. The warehoused goods, however, were principally the very styles which NORDHEIM had admitted were of poor quality [Tr. 283-284, 303-304; App.

], and which were not marketable by TEXTURA [Tr. 275-280, PX 8 8; App.], and no deliveries were made to TEXTURA in March and April [DX CK; App.]. At this time NORDHEIM requested that a meeting be arranged to settle the quality problems [Tr. 311; App.] advising that for the first time JACK SCHWEBEL would be brought in to discuss the quality matter. NORDHEIM requested that TEXTURA send CLARK-SCHWEBEL \$20,000 on pain of continued stoppage of shipments which TEXTURA paid [PX 826; App.] reducing the balance owed CLARK-SCHWEBEL on delivered goods to \$15,000. [Tr. 311; App.].

On April 27, 1966, the meeting requested by NORDHEIM to discuss the quality matter was held in New York. To POWRIE'S surprise, CLARK-SCHWEBEL refused to discuss the quality problem [Tr. 313; App.] and instead for the first time demanded personal guarantees from POWRIE and VERNES F. GRAFSTROM [Tr. 313-314; App.

; App.], a stockholder of TEXTURA.

The very day that POWRIE returned to Los Angeles from his meeting of April 27 with SCHWEBEL and NORDHEIM he received a call from CANN, the Los Angeles BURLINGTON credit man, renewing a request for a personal guarantee [Tr. 369; App.], which POWRIE had previously refused to execute [Tr. 734; App.

; see also DX BF, App.].

Meanwhile, TEXTURA'S quality difficulties with BURLING-TON had been building up to unworkable levels on Crown and Satin Boucle, their most popular fabric styles which were at that time in great demand from TEXTURA [Tr. 349-351; PX 122; PX 123; App.]. On April 19, 1966, in fact, TEXTURA had placed a new order for 30,000 yards of Crown [PX 115; App. BURLINGTON was weaving and shipping under an earlier (January 19, 1966) contract for 25,000 yards of Crown [PX 98; App.]. Satin Boucle was weaving under a contract dated February 10, 1966 for 15,000 yards [PX 103; App.]. Quality problems with these goods were not solved by adjustments, since TEXTURA'S business as a subcontractor tied it to construction schedules which would not permit the delay resulting from reordering [Tr. 349-352; App.]. Accordingly, following numerous complaints, corroborated by ERSKINE [PX 122, 123, 124, 121, 125; App.], TEXTURA asked BURLINGTON to: (1) ship only first quality fabric to TEXTURA to assure it an even flow of usable goods thus obviating the operations problem, and (2) warehouse for <u>mutual</u> inspection the second quality fabrics which would be subject to adjustment on a mutual

basis [Tr. 351; App.]. ERSKINE advised that he would not make the decision and it would have to be taken up by the people in New York [Tr. 351, 355; App.]. Also in May, 1966

POWRIE submitted to NORDHEIM (CLARK-SCHWEBEL) are estimate of \$40,000 in damages and potential damages arising out of poor quality [PX 118; App.], and that it had committed itself to replacing a large job which had utilized a defective CLARK-SCHWEBEL fabric [PX 126; App.].

At this time also, totally frustrated with its inability to obtain goods from CLARK-SCHWEBEL, TEXTURA placed an order with BURLINGTON through PAUL ERSKINE on May 11, 1966 for a half-dozen fabrics including duplicates for the CLARK-SCHWEBEL fabrics

Morro, which CLARK-SCHWEBEL had refused to weave [PX 108; App.]; and Homespun, which was a doubtful quality CLARK-SCHWEBEL fabric, for which CLARK-SCHWEBEL was demanding cash [Tr. 419-419A; App.

]. BURLINGTON initially accepted the orders and they were assigned pre-production numbers by BURLINGTON [Tr. 371, 372; PX 832; App.]. On May 18, 1966, ERSKINE requested that BURLINGTON write contracts to cover the orders, including Morro and Homespun complete with finishing instructions [PX 123; App.]**.

Meanwhile, through May of 1966, NORDHEIM'S continued conversations with POWRIE [Tr. 315-316; App.] concerning the CLARK-

^{*}Because of this refusal, POWRIE had advised NORDHEIM that he was withdrawing the order on May 6, 1966 [PX 827; App.].

**BURLINGTON in fact wove a sample of Morro [Tr. 375; App.].

SCHWEBEL-TEXTURA dispute bore no fruit. NORDHEIM "began to talk about putting the matter in arbitration" [Tr. 315; App.]. On or about June 1, POWRIE advised NORDHEIM that if CLARK-SCHWEBEL instituted an arbitration against TEXTURA to recover \$80,000 to \$90,000 it would have a severe effect on TEXTURA'S credit with BURLINGTON and STEVENS. NORDHEIM replied, "Yes, I know the effect and we will crucify you ..." [Tr. 319; App.].

D. The Events Of June-July 1966.

On June 2, 1966, a meeting was held in New York, attended by VOLLERS and ERSKINE of BURLINGTON and POWRIE at which POWRIE put forth the proposal he had made to ERSKINE in April-May concerning the shipment of first-quality goods [Tr. 358-359; App.]. BURLINGTON counter-proposed that the goods be finished by them to make inspection easier. A decision on POWRIE'S proposal was put off pending an inspection by BUCK, a BURLINGTON technical man, whom BURLINGTON promised to send to the West Coast [Tr. 358-360; App.].

On June 9, 1966, CLARK-SCHWEBEL filed an arbitration against TEXTURA, demanding that payment of \$92,000 for the goods it previously had invoiced [PX 131; App.]. TEXTURA counterclaimed for \$44,000 in defective goods. On the day prior to the filing, NORDHEIM called KELLY advising that arbitration was contemplated, that the account was "difficult and contentious", that CLARK-SCHWEBEL was holding the account to cash terms and that it was refusing any new orders from TEXTURA. NORDHEIM asked KELLY

to keep the information confidential and told him that he would be kept informed. [PX 130; App.].

At about this time and subsequent thereto, NORDHEIM called KELLY more frequently than he had previously. [Tr. 1518; App.], because, "When you're in trouble, what do you do? You protect yourself..." [Tr. 1518-1519; App.].

Shortly after [Tr. 994; App.] the filing by CLARK-SCHWEBEL of the arbitration, SCHWEBEL, who was "not a credit man" [Tr. 1722; App.] had at least one and possible "three, four, two in that area" [Tr. 997; App.] conversations with KELLY wherein he reiterated to KELLY that CLARK-SCHWEBEL had cut down deliveries of TEXTURA'S "running numbers" and had stopped accepting orders for new contracts from TEXTURA [Tr. 997; see PX 146; App.].

On June 13, the first time POWRIE had heard from anyone at BURLINGTON subsequent to the filing of the arbitration by CLARK-SCHWEBEL, ERSKINE called to advise that a new contract for TEXTURA'S style Crown dated April 19, 1966 was "cancelled" by BURLINGTON [Tr. 363; PX 830; App.] although on May 18, ERSKINE had advised that BURLINGTON had been "running short" of TEXTURA'S "requirements" and requested that the style be woven on "two looms as current consumption requires just about that production". [PX 123; App.]. In the same phone call ERSKINE announced to POWRIE that he "had not had an answer" with respect to the weaving of Morro, the fabric which CLARK-SCHWEBEL had refused to weave [Tr. 373; App.

]. On or about the same time VOLLERS took the position that

"until POWRIE accepts what [BURLINGTON] is offering" he [VOLLERS] was "stopping all production on the new orders on which [the credit department had] not given credit approval" [DX BN; App.]* on June 22, POWRIE called VOLLERS to find out "where we stood as far as the conference we had had on June 2nd" [Tr. 366; App.] since BUCK had not appeared as promised [Tr. 359; App.] and POWRIE had heard nothing further on the matter. VOLLERS advised that BURLINGTON "would not or could not" accept TEXTURA'S proposal [Tr. 367; App.] in that it "could not deviate from [the] general contract quality terms". [PX 830; App.]. When asked about the cancelled Crown contract, VOLLERS did not deny the cancellation [Tr. 367; App.] but remarked that he was "turning on [the] tap" on Crown [Tr. 367, 368; App.] and on Satin Boucle and other fabrics [PX 830; App.], implying that weaving on these fabrics had been stopped.

Regarding the fabric Morro, POWRIE in the same phone call asked VOLLERS, "weren't they proceeding with the weaving of it?"

Mr. VOLLERS "didn't directly answer", he was going to "let [POWRIE] know" and left it that he would advise "whether they [BURLINGTON] will weave". [Tr. 373; PX 830; App.].

On June 29, 1966, CANN of BURLINGTON, the West Coast credit man, advised POWRIE that "in view of the large pending arbitration with CLARK-SCHWEBEL", BURLINGTON "could not give [TEXTURA] credit and . . . would have to insist on personal guarantee of he and his wife together with personal financial statements" [PX 141; App.]. On

^{*}Although POWRIE himself had requested that orders for "new styles" be held up, [DX AP; App.], this memorandum indicates that VOLLERS was stopping production on "new orders" for established styles as well, i.e. Crown, which were already in weaving.

June 30, Kelly advised CANN to reaffirm to POWRIE that BURLINGTON "must insist on guarantees . . . until such time as the

CLARK-SCHWEBEL matter is adjusted". [Ibid]. In the same memorandum from BURLINGTON'S files, KELLY noted that "later in the
day" (June 30, 1966) NORDHEIM spoke twice to KELLY, reporting
"in detail" CLARK-SCHWEBEL'S position in the dispute and later
advising of a possibility that POWRIE and agree to a settlement of the rbitration. (Ibid.)

on July 6, 1966, NORDHEIM spoke with POWRIE on the phone offcring him a settlement whereby TEXTURA would take in and pay for all of the goods held in the warehouse (\$66,000 worth) over a three-month period (\$25,000 August 1st, \$25,000 September 1st, \$16,000 October 1st), upon the completion of which TEXTURA would receive a \$7,000 credit against its \$44,000 counterclaim [Tr. 332-335; PX 145; PX 149; App.].

POWRIE advised NORDHEIM that it was impossible for TEXTURA to meet the proposed schedule of payments. [Tr. 335; PX 156; App.

].

On July 8, NORDHEIM called KELLY "to keep [him] abreast of developments" reporting that POWRIE had rejected a proposed settlement of \$25,000 per month as "impossible", and that CLARK-SCHWEBEL had advised POWRIE that on any extended payment plan CLARK-SCHWEBEL would require a "note signed by Mr. and Mrs. POWRIE". [PX 148; App.].

Meanwhile on July 6 and July 8, while NORDHEIM was speaking with KELLY, SCHWEBEL phoned JANETSCHEK of STEVENS reporting that "since CLARK-SCHWEBEL had cut down deliveries on their [TEXTURA'S] running numbers, TEXTURA approached BURLINGTON and placed \$175,000 in orders with them so that they would be sure of at least one source of supply", but that BURLINGTON had "rejected these orders" [PX146, p.1; App.] and further had told POWRIE that BURLINGTON "would not accept any additional business unless [it] was furnished with both MAL POWRIE'S guarantee and his wife's guarantee along with personal financial statements" [PX 146, p. 2; App.]. The source of this information was KELLY who had advised SCHWEBEL of these facts by telephone, SCHWEBEL testified [Tr. 1004; see Tr. 994-1000; App.].

On July 8, 1966 CANN (BURLINGTON) wrote NESBITT, a credit officer of BURLINGTON, with a copy to KELLY "specifically" requestir; that contract 7881, the April 19, 1966 contract for \$30,000 worth of Crown which VOLLERS had first "cancelled", stopped production, and then "turned the tap on" with respect to, be included in the group of contract which BURLINGTON was holding in abeyance pending credit approval [PX 147; App.]. Two weeks earlier, ERSKINE, BURLINGTON'S representative had advised BURLINGTON that TEXTURA, who in April had been "screaming" for Crown "to install on contracts on which it was specified" [Tr. 361; App.] "desperately needed additional" Crown [PX 139; App.].

NOKELEIM called KELLY again on July 26, 1966 and advised him that the matter was going to arbitration and if CLARK-SCHWEBEL

could not obtain a settlement, it intended to pursue the arbitration to a victory and then insist on immediate payment which might "very well bankrupt the account". [PX 158; App.]

During the week of July 27, POWRIE met with SCHUTZ

(KELLY'S superior) who had by this time been advised of the holding up of the Crown contract [PX 147 (note; App.], and KELLY in New York [Tr. 378-382; App.]. SCHUTZ told POWRIE that BURLING-TON could not entertain further open account with TEXTURA unless it settled with CLARK-SCHWEBEL [Tr. 382; App.], confirming what CANN had told POWRIE on June 29 [PX 141; App.]. SCHUTZ further advised POWRIE that he would release him from BURLINGTON'S request for a personal guarantee if he would "sign with CLARK-SCHWEBEL" [Tr. 400; App.].

On July 29, POWRIE and GRAFSTROM met with SCHWEBEL and NORDHEIM at the St. Regis Hotel in New York. At this meeting, CLARK-SCHWEBEL demanded that TEXTURA take in and pay cash for \$70,000 of the warehoused goods over three months, and that TEXTURA take and pay cash for a fabric to be woven from yarn previously utilized in a fabric unacceptable to TEXTURA, following which they would give it a credit of \$12,000 [Tr. 394; PX 166; App.]. These terms represented no more than a \$1,000 net change from those (pay \$66,000 before credit of \$7,000) that TEXTURA had previously indicated were impossible of performance. POWRIE protested that the offering of such a credit only after

TEXTURA took and paid cash for all the "junk" CLARK-SCHWEBEL had in its warehouse was unacceptable [Tr. 397; App.] and that TEXTURA "couldn't do it" [Tr. 398; App. p. Nevertheless, because of the pressure that had been applied by BURLINGTON, in the light of the "drastic condition" of the company (owing to its loss of CLARK-SCHWEBEL as a supplier and source of credit) POWRIE agreed to the terms [Tr. 397, 398, 846; App.].

E. The Events Subsequent To July 1966.

SCHUTZ (BURLINGTON) had asked POWRIE to report back to him "after I [POWRIE] settled with CLARK-SCHWEBEL" [Tr. 399; App.

]; POWRIE called instead, discovering that SCHUTZ already knew that he had agreed to the CLARK-SCHWEBEL settlement [Tr. 400; App.

]. SCHUTZ reneged on his prior promise, continued to insist on the guarantee [Tr. 400; App.], and in late August POWRIE was forced to execute "Buyer's requests for contract modifications" a form prepared by BURLINGTON - cancelling a balance due of 9,217 yards under the January 19, 1966 Crown contract [PX 195; App.] reducing the amount of the April 18th Crown contract [PX 184; App.], upon which weaving had not yet begun [PX 548; App.

] and cancelling 12,568 yards of the 2/10/66 Satin Boucle contract [PX 179; App.]; as POWRIE put it, although he was "losing business", a lot of it over Crown", he "had no choice". [Tr. 401-406; App. -

]. BURLINGTON continued to hold up all orders including Crown and Satin Boucle [PX 171; App.].

At this time TEXTURA suddenly found itself subject to stoppage of shipments unless it met the terms of BURLINGTON'S invoices. As testified to by POWRIE:

"Well, our conversations with Mr. Schutz during that time included the fact that he was changing the extended terms. He wanted my bills paid on 60 days time ... He said if I did not pay in 60 days that he would not allow delivery of any more goods ..." [Tr. 405; App.]

BURLINGTON also refused to allow TEXTURA to pay cash for goods. [PX 197; App.].

- "A. Well, in a telephone conversation I had been talking to Mr. Schutz, He said that he wanted cash and that it could not be used to purchase goods; he had to charge it to my account
- Q. When you paid an invoice at this time to defendant Burlington Industries did they apply it to back invoices or did they allow you to pull out goods for cash with it?
- A. No, they didn't allow me to pull out goods for cash. It was applied to invoices we held." [Tr. 498-499; App.].

Memoranda from BURLINGTON'S files detail the effectuation of this no shipment policy, in August and September of 1966. See: PX 169 (August 9, 1966 KELLY memo):

"Pending ... the payment of past dues, I advised Mr. CANN not to make any shipments to this account..." [App.]

PX 171 (August 10, 1966 KELLY memo):

"Mr. CANN told him [POWRIE] that ... in view of the fact that he was past due, we were still holding all of the orders. At this point Mr. POWRIE got very excited and told CANN that Mr. CANN had previously told him that once the CLARK-SCHWEBEL matter was settled this would solve all the problems. Mr. CANN stated that he never said this [In fact BURLINGTON memoranda indicated that he had, as in-

dicated in his memo See PX 141; App.]... [POWRIE stated that] we were trying to put him out of business ... I advised Mr. CANN not to approve any further shipments." [App.]

PX 186 (August 26, 1965 KELLY memo):

"Do not make shipments if the account is currently past due [on a 60-day basis]." [See also PX 191, 192; App.].

During this period TEXTURA could not meet the 60 day terms; it was paying BURLINGTON with effort on a 90-day basis [PX 806; App.]. In addition, VOLLERS demanded that interest be reimposed on cutstandings in excess of 30 days [PX 169; App.] which charge had been previously lifted from the TEXTURA account in April of 1965 [See PX 806, pp. 9B, 10A; App.]. This was put into effect in late August - early September [PX 186, 192; App.].

A memorandum from BURLINGTON'S files dated September 6, 1966 indicates (1) that NORDHEIM was at all times aware that BURL-INGTON was holding up orders on Crown and (2) that BURLINGTON was taking active steps to aid CLARK-SCHWEBEL in collecting monies due the latter company under the settlement agreement.

"Mr. Ray Nordheim of Clark-Schwebel telephoned me and stated that payments in accordance with the agreement with this account were to be made at the rate of \$10M every two weeks, starting 9/1. They did not receive the 9/1 payment and today, 9/6, they telephoned Mal Powrie. His reply was that the payment was only due last Thursday and that they seemed to be in a hurry to get it. He stated that he is trying to scrape together the \$10M and hopes to send it to them by the end of the week. In reply to the inquiry of "how's business", he stated that business was bad.

Mr. Nordheim also advised me that he had learned from a very good source, whose name he did not reveal that during the time we were holding up orders on this account (with particular reference to the customer's style "Crown") that Paul Erskine was going to convert this material for him personally, in the event [BURLING-TON] refused to do so.

I passed the above information on to Larry Donnelly and told him that when he gets to see Powrie he should state that Clark-Schwebel, in accordance with Powrie's instructions, advised us that the dispute was settled on the basis of \$10M payments every two weeks with the first to start 9/1. Mr. Donnelly, at my request, will ask Powrie whether or not he made the 9/1 payment."

* * * * * * * * * * * * *

"Mr. Donnelly stated that he did not receive the \$6M payment on past due bills. I advised him not to ship to this account while they were past due. He is free to tell Mr. Powrie that he has been so instructed by the New York office." [PX 191; App.]

In September SCHUTZ demanded that TEXTURA pay BURLINGTON a dollar and a half for every dollar in cash it paid. [Tr. 405, PX 198; App.]. At approximately the same time POWRIE and GRAF-STROM met with SCHWEBEL and NORDHEIM concerning TEXTURA'S continuing inability to meet the terms of its settlement agreement with CLARK-SCHWEBEL*. [Tr. 489, 1417-1418; App.]. At this meeting CLARK-SCHWEBEL demanded a dollar and a half for every dollar in cash paid. [Tr. 489-489a; App.].

CLARK-SCHWEBEL did not allow TEXTURA to take out goods on credit to generate cash to pay its settlement terms [Tr. 1009; App.

] thereby effectively eliminating itself as a supplier of TEXTURA. Although in May and June TEXTURA managed to order out approximately \$15,000 worth of useable goods for which it paid cash, no other goods were available to TEXTURA. [Tr. 419-420; App.]. Lynweave, a "good" fabric held by CLARK-SCHWEBEL, was committed to jobs that had not yet called for the fabric and upon which therefore, TEXTURA could not realize immediate funds.

^{*}POWRIE again reinterated that he could not use the goods referred to be taken because of their poor quality. [Tr. 1418; App.].

[Ibid.]. Deliveries for the balance of the year were de minimis (DX CK; App.].

As a result of its own suspension of weaving and stopping of shipments BURLINGTON deliveries dropped from an average of 19,000 yards per month through July 1966 (133,315 total yards) to less than 3,000 yards per month thereafter (14,845 total yards) [PX 829; App.]. In September no goods at all were delivered. [Ibid.]. During the first six months of 1966, TEXTURA purchased approximately 66,000 yards of the fabric Crown from BURLINGTON. Subsequent to the date of the CLARK-SCHWEBEL "settlement" of July 29, 1966, in August and September no Crown was delivered. [PX 829; App.]. Subsequent de minimis deliveries [PX 829; App.] were off-color and of poor "hand" [PX 537; App.].

Deliveries of BURLINGTON fabric Satin Boucle proved unusable [Tr. 377; App.]. VOLLERS never got back to POWRIE regarding the CLARK-SCHWEBEL fabric Morro [Tr. 373; App.], which BURLINGTON was going to attempt to duplicate for TEXTURA, and BURLINGTON never did weave the fabric. [Ibid.]. The former CLARK-SCHWEBEL fabric Homespun which BURLINGTON had written an order on was delivered by BURLINGTON in a form that "in no way resembled" the CLARK-SCHWEBEL weave it was supposed to supplant. [Tr. 408; PX 537; App.]. Nu-Vista, a fabric supposedly available to TEXTURA in large quantities, was delivered in a pink tone totally unacceptable to TEXTURA'S customers. Ibid. BUCK, the technical man who was supposed to be sent to TEXTURA to solve the BURLINGTON quality problems, never showed up [Tr. 359; App.]. The time of TEXTURA President, POWRIE, normally involved in selling and

managing the business, was increasingly taken up with responding to Defendants' incressant demands [Tr. 588-589; App.].

As indicated in statements delivered to BURLINGTON, TEX-TURA had turned the corner in 1966 and its sales and profits were at an all time high through the months of May 1966, as follows:

	SALES		PROFITS
January February March April May	\$150,014 [PX \$149,925 [PX \$150,659 [PX \$140,776 [PX \$152,412 [PX	38; App. 39; App. 40; App.	\$15,873.29 \$17,945.99 \$ 7,306.00 \$ 6,982.60 \$10,635.78

TEXTURA'S factor indicated as of late June that its account was satisfactory. [PX 138; App.]. STEVENS' credit man JANETSCHEK confided that on the basis of his information TEXTURA was doing far better both sales and profitwise than he had ever remembered them doing [Tr. 1517; App.]. TEXTURA'S payables to BURLINGTON were modest relative to prior years [PX 806; App.] and BURLINGTON conceded that it had voluntarily reduced the period of time it took to pay its bills from 120 days to 90 days [DX BM; App.].

As a result of Defendants' actions TEXTURA had neither cash to buy goods nor "fabrics from either BURLINGTON or CLARK-SCHWEBEL ... [to] sell to generate cash" [Tr. 852; App.].

It was unable to fill numerous orders on which Defendants' fabrics were specified and numerous others which it might have filled had it been able to get goods from these, its two largest suppliers and the only significant suppliers for its contract business [See

POINT II, <u>infra</u>]. As a result of the foregoing, TEXTURA'S sales sharply diminished from June through October with resulting huge losses. [<u>Ibid</u>].

Unable to continue in business, TEXTURA made an assignment for the benefit of creditors in December of 1966 and effectively ceased operations.

POINT I

THE EVIDENCE OF DEFENDANTS'
MOTIVES, THEIR OPPORTUNITIES
TO CONSPIRE, THEIR FREQUENT
CONTACTS AND COMMUNICATIONS,
THEIR HARMFUL ACTIONS AGAINST
TEXTURA INCLUDING RESTRICTIONS
ON CREDIT AND REFUSALS TO ACCEPT
OR PROCESS ORDERS, IS SUFFICIENT
TO SUPPORT THE JURY'S DETERMINATION THAT DEFENDANTS CONSPIRED

Determination of whether the jury's verdict that the "conduct" of CLARK-SCHWEBEL and BURLINGTON "toward" TEXTURA "stemmed ... from an agreement tacit or express" rather than "independent decision" (Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540 (1953)) is supported by sufficient evidence, is governed by the Supreme Court's instructions in Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 35 (1943):

"It is not the function of a Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & G.R. Co. v. McDade, 135 U.S. 554, 571, 572, 34 L Ed 235, 241, 242, 10 S Ct. 1044; Tiller v. Atlantic Coast Line R. Co., supra, (318 U.S. 68, 87 L Ed 618, 63 S. Ct. 444, 143

ALR 967); Bailey v. Central Vermont R. Co., 319 U.S. 350, 353, 354, 87 L Ed 1444, 1447, 1448, 63 S. Ct. 1062. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Plaintiff is entitled to "the benefit of all inferences which the evidence fairly supports" Fortunato v. Ford Motor Co., 464 F. 2d 962, 965 (2d Cir. 1972). Further, "all conflicts between evidence submitted by the prevailing party and evidence submitted by the losing party are to be resolved in favor of the verdict". Standard Oil Of California v. Moore, 251 F. 2d 188, (9th Cir., 1957.) "Where testimony submitted by the losing party, although not directly contradicted is inconsistent with the verdict, it is to be assumed that the jury disbelieved such testimony, as it had the right to do." Ibid. In order to set aside a jury verdict in a conspiracy case, applying the above principles, the Court must conclude "as a matter of law that an inference of no agreement is compelled". Esco Corp. v. U. S., 340 F. 2d 1000, 1007 (9th Cir. 1965). [Emphasis Added].

That allegations of conspiracy are not to be considered piecemeal where the issue involves the sufficiency of evidence to justify a jury finding of conspiracy was established by the Supreme Court in Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690, 699 (1962). See also <u>U.S. v. L.D. Caulk Company</u>, 126 F.

Supp. 693, 698 (D. Del. 1954):

"...a conspiracy is not to be viewed from a consideration of its component parts which may be unobjectionable in themselves and taken separately, but from an examination of the whole of the elements or a panorama of all the acts and circumstances."

Despite the clear cut prohibition of dismembering conspiracies into component parts in challenging the sufficiency of the evidence in support of the conspiracy, Defendants have attempted to do just that. Thus, CLARK-SCHWEBEL breaks the evidence down to categories of "Credit Exchange", "Similar Action" and "Other Evidence of Conspiracy". BURLINGTON compartmentalizes the evidence of conspiracy by separately analyzing "Credit Exchanges" and Defendants' "Motives" and "Threats" or "Admissions".

It has long been held that a conspiracy is an express or tacit agreement or concert of action which can rarely be proven by direct evidence. Accordingly, in most conspiracy cases, a finding of agreement is generally predicated upon circumstantial evidence and evidence of the conduct of the parties.

"Moreover, no formal agreement is necessary to constitute an unlawful conspiracy; it is sufficient that a concert of action be contemplated and the defendants conform to the arrangement. "Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified." American Tobacco Co. v. United States, 328 U.S. 781, 810 (1945). See also Esco Corp. v. United States, 340 F. 2d 1000 (9th Cir. 1965). [U.S. v. American Radiator & Standard Sanitary Corp., 1970 Trade Cases ¶73,331 at p. 89, 297 (W. D. Pa. 1970)]

Allegations of conspiracy in a concentrated industry dominated by few sellers pose special difficulties:

"...we are aware of the difficulties of proof of modern antitrust conspiracy and that the difficulties increase as the number of conspirators lessens. It is certainly true that the picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age." [Delaware Valley Marine Supply Co. v. American Tobacco Co., 297 F. 2d 199, 202 (3rd Cir. 1961) cert. den. 369 U.S. 839 (1962)]. [Footnote omitted].

As demonstrated in the Statement Of Facts and as the lowert Court held:

"Plaintiff proffered evidence of notive, constant contact and communication between defendants at the time of their similar, if not identical, restrictive conduct, as well as admissions and threats." [App.]

Defendants raise no real question of law but seek to retry the case before this Court on the theory that (a) the jury should have believed hearsay statements contained in business record memoranda written by BURLINGTON employees and former employees* in preference to the testimony of Mr. POWRIE, Plaintiffs' chief witness; (b) the jury should have believed those parts of the testimony of hostile witnesses and memoranda from Defendants' files favorable to their version of the facts and rejected those parts favorable to Plaintiffs' version; (c) that the jury should not have inferred the existence of facts circumstantially and (d) that for the foregoing reasons the inferences which Plaintiffs sought to have the jury draw were impermissable. As the foregoing cited authorities indicate, this is not

^{*}None of whom BURLINGTON saw fit to produce with the exception of a Mr. GARVEY whose connection with the events which took place in 1966 was tangential at best [Tr.2114-2115, 2123-2124; App.] ar who had no personal knowledge of the matters in most of the memoranda introduced in evidence through him [Tr. 2120-2122; App.].

the law. The Court's review is limited to judging whether a rational basis exists for the inferences which the jury drew from the evidence.

- 1. The existence of the unusual identical credit arrangements between TEXTURA and CLARK-SCHWEBEL and TEXTURA and BURLINGTON, negotiated by the same person, CLARK and the suggestion of cooperation contained in the early communications between the two competitors provided sufficient basis for an inference that something more than the mere exchange of information was involved in their dealings with this unique account, to wit, collaboration in the formulation of common credit policy. [See, e.g. PX 81; App.]. The mere fact that the collaboration occurred prior to the time Plaintiff alleges the conspiracy began does not foreclose all jury consideration of it nor does it automatically brand the behavior as independent. To the contrary, this early cooperation could "well have influenced the jury's interpretation of later words and events" (Standard Oil Co. v. Moore, supra, 251 F. 2d at 200).
- 2. It was a reasonable inference from evidence of complaints from BURLINGTON customers, the suppliers' irritation with pressing of quality demands by TEXTURA, and COLTON'S admission regarding BURLINGTON'S desire to replace TEXTURA, that both suppliers had motives to eliminate TEXTURA from the decorative fiberglass fabric business in 1966.

The jury was entitled to reject VOLLERS' testimony that

BURLINGTON did not wish to take action against TEXTURA as a result of its customers' complaints as self-serving and false, especially in the light of the fact that he changed his testimony between the time of this deposition and his appearance at trial to make it appear that TEXTURA'S sales methods were not the cause of the complaints*. Contrary to BURLINGTON'S arguments, Plaintiff does not have the burden of explaining why BURLINGTON took no action until 1966; its burden is satisfied by showing that the motive still existed in 1966. The appearance, immediately after TEXTURA'S demise, of a West Coast outlet, organized by a BURLINGTON sales representative, for "fabrics formerly reaching the market through TEXTURA", and committed to eliminating the undesirable practices, supports Plaintiffs' theory, [PX 884; App.].

3. It was a permissable inference for the jury to conclude that the alleged mere "exchanges of credit information" were not so but were instead vehicles for coordination of an agreed united credit policy and/or invitations to BURLINGTON to aid CLARK-SCHWEBEL in pressuring ' XTURA to accede to CLARK-SCHWEBEL'S demands.

Defendants appear to argue that their numerous contacts and communications during the period of the conspiracy were limited to exchanges of credit information about TEXTURA and since such exchanges are not themselves unlawful under Cement Manufacturers Prot.

Ass'n. v. U.S., 268 U.S. 588 (1925) and Swift & Co. v. U.S., 196 U.S.

375 (1905) - they cannot be used to support the jury's finding of conspiracy. This simplistic argument overlooks the basic legal premise that inherently legal acts or conduct lose their immunity when

used in furtherance of a conspiracy. "It has long been established that the legality of the means selected to effectuate an unlawful purpose does not immunize those engaged in the conspiracy to accomplish it." (Citations omitted) U.S. v. General Dyestuff Corp., 57 F. Supp. 642 (S.D.N.Y. 1944).

"The thesis of the briefs of appellants is that this right was absolute, and therefore they could agree to do these acts to the detriment of Paradise with legal impunity. This is not the law. The trial court told the jury that no inference of conspiracy was to be drawn from the doing of these acts. But, if a conspiracy were found, such acts were no longer lawful if done in pursuance of the objectives for bringing about the consummation of the unlawful design which the jury found." (Fox West Coast Theatre Building Corp., 264 F. 2d 602 at 606 (9th Cir. 1958).

Furthermore, Flaintiffs submit that the alleged exchanges must be considered in the light of the fact that the suppliers allegedly exchanging the information were the dominant suppliers of the customer in a concentrated industry. The potential effect of the coordination of credit policy by agreement in such an industry - and the consequent non-exercise by one of the suppliers of its independent judgment - is disastrous. Simply stated it can mean the difference between the customer's staying in business or not. Severe scrutiny must be paid to such communications then between suppliers in a concentrated industry to determine whether or not they are being used as a vehicle for illegal agreements to act together with respect to common

customers.*

Secondly, the communications cannot be isolated as Defendants wish but must be considered in the context of the events surrounding them. Turning them to the communications at issue, it is clear that the jury could have found that NORDHEIM'S "more frequent" calls to KELLY surrounding the filing of the arbitration because "when you are in trouble what do you do, you protect yourself" had nothing whatever to do with the "gathering and exchange of credit information". On the contrary, a reasonable interpretation of his testimony is that NORDHEIM expected and hoped that BURLINGTON would take credit action against TEXTURA which would force it to settle with CLARK-SCHWEBEL, which is precisely what happened. [Clearly NORDHEIM'S advising KELLY of the status of the account would not give him any "protection" absent an expectation that the advice would lead to some action on the part of BURLINGTON; nor would information given NORDHEIM of BURLINGTON'S current position or actions afford him any protection unless he intended to utilize same somehow to gain further advantages over TEXTURA.]

The jury could also have considered SCHWEBEL'S calls to

^{*}There indeed may be "instances where behavior, lawful if indulged in by producers in a highly competitive industry, is held unlawful when indulged in by ... [those] with a higher degree of market power." See Turner, The Definition of Agreement under the Sherman Act, 75 Harv. L. Rev., 655 at 666 [1962].

KELLY in and around the time of the arbitration filing to be anything but "routine" in the light of the evidence of his non-involvement with the decorative side of the business and JANETS-CHEK'S (STEVENS' credit man) testimony that SCHWEBEL was "not a credit man" and was not a person whom he would normally call for credit information. [Tr. 1722; App.]. Similarly a fair inference to be drawn from SCHWEBEL'S report of his calls to KFLLY in his phone conversation with JANETSCHEK, in the light of the substance of his phone calls to JANETSCHEK, is that SCHWEBEL, consistent with the express purpose of NORD-HEIM'S calls, was suggesting joint action to his competitors:

I received a call this morning from Jack Schwebel. Jack called to find out how our account has been running. I told Jack our recent high was about \$35,000 and at the moment Powrie probably owes us less than \$20,000 and if memory serves me correct the last statement I saw on the account indicated Textura wasn't in bad shape with us at all.

Jack went on to tell me that he feels that if we check with our Merchandise Department we will find we probably have a good amount of yardage on order which has probably been on order for quite some time.

* * * * * * * * * * * *

What made [Clark-Schwebel] unhappy, however, was the fact that they had about \$90,000 in goods woven up against contracts on order for him most of which they had been holding from 6 to 18 months and there was no indication from Powrie that he was in any rush to call these goods out. During the course of their relationship with Textura they've had numerous complaints and claims from him and always had a history of deferring deliveries.

* * * * * * * * * * * *

Jack also mentioned to me that since Clark-Schwebel had cut down deliveries on their running numbers Textura approached Hess Goldsmith and placed \$175,000 in orders with them so that they would be sure of at least one source of supply. Hess, however, rejected these orders. [PX 146; App.].

The jury, considering all of the acts and events surrounding these communications, found that the expectation, invitation and suggestion of reciprocal action reflected in NORDHEIM'S and SCHWEBEL'S calls to BURLINGTON ripened into an agreement. This conclusion is firmly based on evidence in the record.

4. The jury could have fairly inferred that BURLINGTON suspended weaving on TEXTURA fabrics Crown (and others) in response to CLARK-SCHWEBEL'S communications to BURLINGTON.

BURLINGTON has conceded that failure to weave under the April 18, 1966 contract caused the unavailability of Crown during August and September [BURLINGTON Brief, p. 34]; despite TEXTURA'S expressed desperate need for fabric, as of August 24, 1966, 8,217 yards of Crown and 12,568 yards of Satin Boucle owing under earlier contracts also remained unshipped [PX 179, 185; App.]. Without regard to the status of Crown prior to the alleged "first" communication by NORDHEIM to KELLY on June 8, 1966 regarding the arbitration, it is clear that immediately thereafter POWRIE was advised by BURLINGTON that the new contract for Crown was "cancelled" of which he had no prior advice. VOLLERS remarked on June 22, 1966 to POWRIE that he would "turn the tap on that [Crown]". The jury could have considered, in connection with these remarks, the simultaneity of VOLLERS' announcement that he was holding up all orders

"until POWRIE accepts what HESS is offering" (June 6-14) with CLARK-SCHWEBEL'S decision to put TEXTURA into arbitration (June 7-9) both of which actions relate to TEXTURA'S quality complaints. A strong inference is created that both the suspension of weaving under the existing contracts and the "cancellation" or holding up of the new orders were in fact orchestrated with CLARK-SCHWEBEL'S arbitration claim instituted June 9 and communicated by CLARK-SCHWEBEL to BURLINGTON at least as early as June 8. Furthermore, CANN'S otherwise inexplicable request on July 8 that the new Crown contract be "included" in the group of new contracts which BURLINGTON was holding pending credit approval*, [PX 147; App.], suggests strongly that BURLINGTON'S actions with respect to Crown were not the product of consistent internal policy but were reacting to outside forces. [This was also the time of NORDHEIM'S and SCHWEBEL'S greatest activity in communicating with BURLINGTON.]

BURLINGTON, however, contends that all actions taken by it were credit decisions made by its credit people for credit reasons. It has sought to ridicule Plaintiffs' allegations that any other motive or indeed personnel of BURLINGTON participated

^{*}Although a week earlier, ERSKINE had advised GOTTSCHALK, of BURLINGTON, that TEXTURA was desperate for Crown. [PX 139; App.].

in these decisions. However, its own witness, a credit man, testified as follows on cross-examination:

- "Q. In that connection you made a number of statements concerning the weaving of the fabric Crown. You wouldn't have any idea whether the weaving of Crown was suspended or not, would you?
- A. Yes, because Mr. Colton told us so. The sales division gave us that information.
- Q. That the weaving of Crown had been suspended?
- A. Correct. We got that from the sales division." [Tr. 2119; App.].

Obviously if GARVEY was <u>informed</u> by the sales division that the weaving of Crown had been suspended (1) he could not have known that prior to that time and (2) it must not have been the <u>credit</u> department who suspended it and BURLINGTON'S alleged "rational" explanation fails. COLTON and VOLLERS of the sales department, it will be noted, were the persons who had received the complaints from Qualfab and others concerning TEXTURA'S selling methods; their implication in the decision to suspend weaving on a crucial fabric at a time when CLARK-SCHWEBEL had decided to bring an arbitration which, if successful, would bankrupt the account, raises a strong inference that the opportunity to take a united stand with its competitor and discipline or be rid of the trouble making account was at the forefront of their reasons for acting.

5. It was a reasonable inference for the jury to make that BURLINGTON demanded a personal guarantee and threatened to terminate

TEXTURA'S credit, all in response to communication from CLARK-SCHWEBEL. It is clear that whatever the status of the demand for the guarantee prior to the communications from CLARK-SCHWEBEL, subsequent to these communications, it was expressly tied to TEX-TURA'S settlement of the arbitration with CLARK-SCHWEBEL. Thus, on June 30, 1966, 8 days after VOLLERS had advised POWRIE that the weaving on fabrics had been suspended, KELLY advised CANN to "reaffirm [his communication of the prior day] to Mr. POWRIE that we must insist on the guarantees and financial statements until such time as the C-S [CLARK-SCHWEBEL] matter is adjusted" [PX 141; App.]. SCHUTZ confirmed that BURLINGTON would release POWRIE from the demand for a guarantee if he would "sign with CLARK-SCHWEBEL" [Tr. 400; App.]. BURLINGTON clearly knew from its lack of success and direct advice from POWRIE that he was reluctant to sign a guarantee [DX BF; App.]. Its insistence on the guarantee on what were clearly new conditions might well have been interpreted by the jury (in light of the coincident demand made by CLARK-SCHWEBEL in late April) as less responsive to internal credit policy than to pressures from its competitor to take coercive action.

6. No threat to terminate the credit of TEXTURA had ever been made by BURLINGTON prior to CLARK-SCHWEBEL'S communications to BURLINGTON. Yet, during the week of July 27, immediately prior to the meeting at the St. Regis where settlement was to be discussed between CLARK-SCHWEBEL and TEXTURA, SCHUTZ [BURLINGTON] who by this time was aware that CLARK-SCHWEBEL'S demands for settlement were impossible of performance, unreasonable and oppressive

to TEXTURA [PX 148; App.] told POWRIE that BURLINGTON could not entertain further open account with TEXTURA unless it settled with CLARK-SCHWEBEL. [Tr. 382; App.]. This was not an isolated statement of questionable authenticity as BURLINGTON claims, but a confirmation of CANN'S advice to POWRIE on June 29 that "in view of the large pending arbitration with CLARK-SCHWEBEL", BURLINGTON "could not give [TEXTURA] credit . . . [PX 141; App.]."
The jury could have found that these actions of BURLINGTON were in "prophetic fulfillment" of NORDHEIM'S threat to POWRIE that his suppliers would "crucify" TEXTURA unless it dropped its opposition to CLARK-SCHWEBEL*. See Standard Oil Co. v. Moore, supra, 251 F.
2d at 208. Significantly, CANN, the one BURLINGTON employee whose testimony might have clarified its actions and statements, was not produced to testify by Defendants.

7. It was equally a permissible inference for the jury to make that VOLLER'S (BURLINGTON) change of mind regarding the weaving of the CLARK-SCHWEBEL fabric Morro after BURLINGTON was advised of the dispute between TEXTURA and CLARK-SCHWEBEL points strongly in the direction of agreement. That BURLINGTON did weave Homespun, another CLARK-SCHWEBEL fabric does not, as BURLINGTON contends, rebut this inference; rather, the evidence that BURLING-TON wove the fabric in a weave which, in the words of their own sales representative, didn't "look at all" like the CLARK-SCHWEBEL fabric it was supposed to supplant strongly underscores the infer-

^{*}Contrary to BURLINGTON'S claims, these and other statements of NORDHEIM and SCHWEBEL were clearly admissable against BURLINGTON as there was ample independent evidence of concert of action between the two suppliers with respect to the TEXTURA account. United States v. Williams, 435 F. 2d 642 (9th Cir. 1970), cert. denied 401 U.S. 995 (1971).

ence of agreement.

- 8. Similarly, the jury could have found that BURLINGTON'S outright rejection of TEXTURA'S quality proposals, failure to send the technical man and general disregard of the account were prompted by CLARK-SCHWEBEL'S overtures. The dates again are significant here. A spirit of compromise was present at the BURLINGTON-TEXTURA June 2nd meeting in New York and discussions were projected to continue. Subsequent to June 8, the date KELLY (BURLINGTON) was approached by NORDHEIM (CLARK-SCHWEBEL), BURLINGTON never did continue discussions as it had promised. Instead, it rejected POWRIE'S proposal outright [PX 227; App.], took coercive action to compel him to abandon his complaints [DX BN; App.] and from that time disregarded the problem and neglected the account*, with the result that bad quality continued. The two competitors' mutual interest in squelching the demands of POWRIE for better quality, is obvious. In light of all of the evidence the jury could have found that once BURLING-TON was apprised by NORDHEIM on June 9 of the extent of the quality dispute between the two parties, it agreed to stand with its competitor in resisting these demands.
- 9. BURLINGTON and CLARK-SCHWEBEL base their arguments in part on the allegations that certain of the policies implemented against TEXTURA in 1966 were developed independently prior to the time the alleged conspiracy began in March 1966 and in any event prior to June 8, 1966 the date of the alleged first communication

^{*}VOLLERS himself testified that after that date, whether BURLINGTON solved the quality problem or not became "immaterial". [Tr. 1830; App.].

between CLARK-SCHWEBEL and BURLINGTON with respect to the dispute. Plaintiffs have shown that the jury could have found (1) that these policies did not have independent origins and (2) that in any event they were continued and implemented in furtherance of a conspiracy.* In any event, the jury might have concluded that BURLINGTON was informed of the CLARK-SCHWEBEL actions on or about the time they occurred in March of 1966. Defendants seek to treat as the only communications between Defendants those evidenced by written memoranda or directly recalled by SCHWEBEL or NORDHEIM. But NORDHEIM did not recall any specific conversations without having his recollection refreshed by use of memoranda from BURLINGTON'S files. Yet he "regularly" called KELLY whenever he had a problem with a common account and he "unequivocally" followed this practice. [Tr. 1527-1528; App.]. Clearly the jury was permitted to infer from this testimony and evidence of their prior communications [see, e.g. PX 81, 91; App.] that KELLY was alerted when CLARK-SCHWEBEL took the drastic and unprecedented step of terminating TEXTURA'S credit and refusing to ship it goods. See Rule 406, Federal Rules of Evidence, 88 Stat. 1926 (1975). any event, POWRIE himself alerted BURLINGTON of the dispute on March 18, 1966. [DX BF; App.

10. It was equally permissible for the jury to infer that BURLINGTON'S insistence that TEXTURA pay within 60 days, cessation of shipments when the account was not current, refusal to allow

^{*}The jury might well have concluded that having totally failed in their efforts to e.g. back TEXTURA down on the matter of quality and reduction of the extended terms, Defendants determined to act jointly.

cash withdrawals, and demands for higher ratio of payment were orchestrated with CLARK-SCHWEBEL who was having great difficulty enforcing payments against TEXTURA under the settlement agreement [CLARK-SCHWEBEL Brief, pp. 21-23]. Indeed, the jury might well have interpreted PX 191 [App.] as reflecting a KELLY agreement with NORDHEIM to have BURLINGTON credit people covertly put pressure on TEXTURA to enforce payments due to CLARK-SCHWEBEL under the settlement agreement. Considered in the light of this document the jury could infer that the restrict ve actions against the TEXTURA account taken by BURLINGTON were less responsive to internal credit policy than to tacit agreement to bring TEXTURA to its knees.

If the jury found, as they could have, that BURLINGTON pursuant to tacit or express agreement with CLARK-SCHWEBEL combined with CLARK-SCHWEBEL to restrict TEXTURA'S credit and supply of goods, then clearly the fact that CLARK-SCHWEBEL'S refusal to process orders and termination of cedit in March 1966, as well as its rejection of TEXTURA'S quality claims, were initially undertaken independently will not avail Defendants, for the jury will have found that such policies were furthered thereafter by conspiracy. Fox West Coast Theatre Building Corp., supra. Since BURLINGTON was aware that CLARK-SCHWEBEL'S demands boded the bank-ruptcy of TEXTURA, it is responsible for the results which its conspiratorial actions effected*.

^{*}And as respects statements of various appellees that they did not intend to join a combination or to fix prices, we need only say that they "must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary". United States v. Patten, 226 U.S. 525, 543. [U.S. v. Masonite Corp., 316 U.S. 265, 2/5 (1942).

Defendants argue that since their actions may be explicable as independent reactions to a common set of facts, no inference of conspiracy could be drawn by the jury. This is not the law.

"It is true that one engaged in private enterprise may select his own customers, and in the absence of an illegal agreement, may sell or refuse to sell to a customer for good cause, or for no cause whatever. But it is not for the seller to finally decide that it was for a good business reason, or no reason, that he refused to deal. That decision, placed in its proper perspective of circumstances and facts known to the seller, must be judged by the trier of facts, to determine if it was an innocent and lawful exercise of the seller's private right or an unlawful conspiracy.

Were it otherwise, there could never be a civil judgment nor any criminal conviction against any manufacturer of products flowing in interstate commerce. He could merely state - 'despite my knowledge of a conspiracy which existed, which I knew to be unlawful, I'm innocent and cannot be held liable because I say I exercised my business judgment, and I can refuse to sell to anyone, and that is lawful, no matter what the circumstances may be." [Emphasis Added]. Flintkote Company v. Lysfjord, 246 F. 2d 368 at 376 (9th Cir. 1957).

Rather such evidence is conclusive <u>only</u> where there is absent any other rational explanation for Defendants' acts, here supplied by the evidence outlined above.

"Evidence tending to show that there was a legitimate business reason for the act of an individual merchant in refusing to deal is always admissible in contradiction of a case built upon circumstantial evidence. But, if there is sufficient evidence to support a finding that a merchant entered into such an agreement, combination, or conspiracy, the fact that his individual refusal to leal may be explainable as a reasonable business decision is not excusatory of liability. He will be deemed to have set in motion an illegal undertaking, and will be held accountable for damage caused by the overt act of any member, pursuant to or in furtherance of the plan." Standard Oil of California v. Moore, supra, 251 F. 2d at 211.

"Of course, this was all proper evidence to be submitted to the jury upon the claim of appellants that the refusal of Loew's to establish an additional seven-day run for Paradise without bidding was based upon reasonable business considerations. But the question whether Loew's acted because of such considerations or, on the other hand, had entered into a conspiracy to refuse with others was still for the jury, since there was substantial evidence to support the latter contention." Fox West Coast Theatres Corp. v. Paradise Theatre Building Corp., supra.

"Defendant contends that any refusal of these dealers to trade with plaintiff is action pursuant to independent decisions of the dealers acting in their own self-interest and is at most the kind of 'conscious parallelism' of business behavior which has been held beyond the reach of the Sherman Act. ... Whether plaintiff's inability to obtain factory Fords from these dealers was the result of individual business decisions or reflected an agreement with defendant was a matter for the jury to decide. We cannot say on this record that a finding that these dealers acted pursuant to an agreement with defendant was clearly erroneous." Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F. 2d 874 at 880 (lst Cir. 1966) [Citations omitted].

In Flintkote Company v. Lysfjord, 246 F. 2d 368 (9th Cir. 1957), plaintiff alleged that defendant, tile seller, Flintkote, had ceased supplying it with the raw materials necessary for its business as a result of pressure from defendant tile contractors, who competed with plaintiff. A jury verdict was returned in favor of plaintiff and defendants appealed, attacking the sufficiency of the evidence. The Court admitted that while all the direct evidence indicated that defendant Flintkote neither knew of nor participated in any conspiratorial activities, there was nevertheless sufficient circumstantial evidence introduced to support the jury verdict.

"There was no direct evidence that Flintkote, as a seller of tile and not an installer, participated directly in that original conspiracy between the dealers, but there was evidence from which an inference might have been drawn by the trier of fact warranting the belief that the deferdant Flintkote, through acting as supplier to the conspira-

tors on some of the jobs, could have acquired knowledge of the conspiracy; and there was evidence which warranted the conclusion that Flintkote, with such inferred knowledge, participated in the conspiracy, and aided it, by its refusal to sell to plaintiffs." 296 F. 2d at 375.

* * * * * * * * * * * * *

"Neither knowledge of the conspiracy alleged, nor participation therein, need be proved by direct evidence, even in criminal prosecutions where the rule of proof is more strict than in civil conspiracy cases." <u>United States v. Univis Lens Co.</u> 38 Fed. Supp. 809, 813. [246 F. 2d at p. 374]

Defendants rely on cases such as Hallmark Industry v. Reynolds Metal Co., 489 F. 2d 8 (9th Cir. 1973), cert. denied, 417 U.S. 932 (1974); Clark v. United Bank of Denver, N.A., 480 F. 2d 235 (10th C. 1973), cert. denied, 414 U.S. 1004 (1973); and Di-Wal, Inc. v. Fibreboard Corp., 1970 Trade Cases ¶73,155 (N. D. Cal.) where it was found that an initial refusal to grant credit or a withdrawal of credit resulted only from an independent business judgm t by the involved defendants. These cases have no relevance to a situation such as the present - where the jury on the basis of sufficient evidence found that the restriction of credit and sales terms by BURLINGTON and CLARK-SCHWEBEL was the result of joint action rather than independent business judgment. In Di-Wal, Inc. v. Fibreboard Corp., supra, the trial court expressly found that defendant Fibreboard had "made an independent decision to follow and withdrew extended credit terms for a short period of time..." (p. 88, 558) and noted that Fibreboard "never communicated" with the other defendants as to changes in terms of conditions or sale of the products defendants were selling.

In Hallmark, supra, the Court of Appeals affirmed the granting of a judgment notwithstanding the verdict because the plaintiff had not introduced any evidence to rebut the testimony that defendant Hallmark, an aluminum supplier, had independently decided not to extend credit to the plaintiff, with whom it had not previously dealt, and who had a "financial position of near insolvency", rather than conspiring with the other defendant Stanray who was competing with plaintiff. The Court buttressed its findings that Hallmark had no motive to conspire with Stanray in deciding not to make a sale on credit to plaintiff by pointing out that "Reynolds' engineers had already determined that they could not supply Stanray with its needs". In the Clark case, supra, again a plaintiff failed to show that the defendant had an improper motive for refusing to extend credit. There the evidence demonstrated that defendant,

"...United had ample and valid reason to refuse the loan based on appellants' failure to obtain adequate financial resources and their lack of adequate managerial qualifications in the area of financial institutions. There is nothing in the record considered by the trial court which would indicate the refusal by United was prompted by any other reason." [480 F. 2d at 238].

As the foregoing discussion indicates these cases are clearly not in point where evidence of threats, motive, conspiratorial invitation, and reaction which can be interpreted as acceptance of that invitation rather than as internally motivated, exists. See Standard Oil of California v. Moore, supra.

Defendants allege that Plaintiff has not met the criteria

for succeeding under the theory of conscious parallelism. However, this is not, as Defendants would have us believe, a typical
group boycott (e.g. Ford Motor Co. v. Webster's Auto Sales, supra;
Fox West Coast Theatres Corp. v. Paradise Theatre Bldg. Co., supra),
or price-fixing case (e.g., Esco Corp. v. U.S., supra; Wall Products
Co. v. National Gypsum Co., 326 F. Supp. 295 (N. D. Cal. 1971)) in
which the plaintiff's primary proof of conspiracy is the evidence
of the defendants' conscious parallel acts*. As in U.S. v. General
Motors Corp., 384 U.S. 127, 140 (1966) "We have here a classic conspiracy in restraint of trade ...", in view of the evidence of Defendants' mutually restrictive conduct, motives, threats and constant
contact and communication during the period of the conspiracy.

ln its opinion, [App.], the District Court
noted,

"Defendants rely heavily upon the contention that plaintiffs' proof fails to meet the criteria necessary for the doctrine of conscious parallelism to apply here. Again, it should be noted that plaintiff has met those criteria by establishing evidence of similar or parallel conduct -not identical and contemporaneous conduct, which are the criteria urged by defendants. Plaintiff has shown restrictions of Textura's credit, cessation of deliveries, refusals to process orders, demands for personal guarantees, all which were effected in apparent contradiction to defer ants self-interest and all of which could have been deemed. tical only if the other parties to the conspiracy had agreed to wat in a similar manner. Variations as to the time actions were taken and methods used to accomplish the purpose of the conspiracy are of little aid to defendants, particularly since plaintiff need not rely on the doctrine of conscious parallelism alone; plaintiff proffered evidence of motive, constant contact and communications between defendants at the time of their similar, if not identical, restrictive conduct, as well as admissions and threats."

^{*}Nor as Defendants seem to imply is conscious parallelism a prerequisite to a finding of conspiracy (U.S. v. General Motors Corp., supra) -- it is simply evidence from which the trier of fact may infer agreement (Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., supra).

As the above argument indicates, however, TEXTURA has met the criteria necessary to satisfy the conscious parallelism cases by establishing evidence of similar or parallel conduct (e.g., restrictions of TEXTURA'S credit, cessation of deliveries, refusals to process orders; demands for personal guarantees, demands for higher payment ratio) "taken in apparent contradiction to the self-interest" of the Defendants or conduct which was "rational only if the other parties to an alleged conspiracy acted in a similar manner. Citations omitted]." (Pacific Tobacco Corp. v. American Tobacco Co., 1974 Trade Cases ¶74,991 (at pps. 96,401, 96,402) (D. Ore. 1974)), along with the plus* evidence of motives, threats and constant contact and communication between the Defendants. Here both CLARK-SCHWEBEL and BURLINGTON knew that they could not succeed in driving TEXTURA out of business unless they both restricted its credit and both refused to fill or accept its orders for fabric. Otherwise, the manufacturer unilaterally imposing the credit restrictions would see his TEXTURA business diverted to the other manufacturer without any detrimental effect upon TEXTURA and without any beneficial effect to Defendants' complaining customers.

In any event, Plaintiffs' evidence was sufficient to prove "classic" conspiracy.

"It was enough that, knowing that concerted action

^{*}The "plus" evidence may also include such matters as proof of prior conspiratorial behavior by defendants (Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., supra), and a defendant's "apparent close connection with the climax of the conspiracy..." (Pittsburgh Plate Glass Company v. U.S., 260 F. 2d 397, 401 (4th Cir. 1958) aff'd 360 U.S. 395 (1959).

was contemplated and invited, the distributors gave their adherence to the scheme and participated in it.

* * * * * * * * * * * * *

"It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. [Citations omitted].

* * * * * * * * * * * * *

"Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." [Citations omitted]. Interstate Circuit, Inc. v. U.S., 306 U.S. 208, 226, 227 (1938).

The following quotation from <u>Delaware Valley Marine Supply Co.</u> v. <u>American Tobacco Co.</u>, 297 F. 2d 199, 204 (3rd Cir. 1961) <u>cert.</u> <u>denied</u> 369 U.S. 839 (1969) should be dispositive of Defendants' contention that their actions in restricting the conditions of sale to TEXTURA were not sufficiently uniform:

"The defendants urge that there can be no finding of parallelism because the manner of rejection was not uniform: L&M and American denied the application by letter without any investigation; Lorillard and Reynolds did not even answer the letters; PM adhered to its earlier decision but only after extensive investigation and consideration. But the defendants cannot escape the impact of the antitrust laws so easily. If it were otherwise a charge of conspiracy could always be avoided by agreeing to go home by different roads. The plaintiff's case, of course, would be the stronger if it would show that all the tobacco company defendants had rejected the plaintiff's applications in the same way: vide, the automatic refusal to deal of Milgram v. Loew's supra. But there was a uniformity of action on a crucial point: all the corporate defendants denied the plaintiff's application. If there are sufficient other facts and inferences which can be drawn from the record from which the jury might not be prevented from recovery simply because of differences in the ways in which its applications were rejected by the defendants."

See also Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens,

Inc., 394 U.S. 700 (1969) and Esco Corp. v. U.S., supra, 340 F. 2d
at p. 1008:

"Applying these rules to the facts at hand, the jury came to an opposite conclusion from that which appellant urges, and the fact that Esco's involvement was in but two of ten allegedly conspirational situations does not absolve Esco from participation in the entire conspiracy if its involvement in the two was unlawful and knowingly and purposely performed."

Finally, that STEVENS was acquitted of the charges does not compel a similar result as to BURLINGTON and CLARK-SCHWEBEL.

As noted in Fox West Coast Theatres Corp. v. Paradise Theatre Bldg.

Corp.:

"There was substantial evidence upon which the jury might have found a conspiracy by Fox West Coast, Loew's and Twentieth Century-Fox. There was evidence from which the jury might have found that Universal, Warners and Paramount were members of the conspiracy. However, the jury, as fact finders, brought a verdict absolving the three latter of complicity in the unlawful agreement. However, this as to each of these three defendants does not absolve Fox West Coast, Loew's and Twentieth Century Fox even if the verdicts were inconsistent. Once there is found that there was substantial evidence that these three organizations combined unlawfully to discriminate against Paradise, then evidence of action by others tending to produce the unlawful result may be corroborative of the charge, even though these others may not be found eventually to have been conspirators. The jury may clear some participants in parallel action for lack of knowledge of the scheme or unlawful design or because they were coerced. Thus, although each may have been a participant in acts which tended to effectuate the result complained of, the jury may have found them innocent tools of the conspirators whom the jury found unlawfully formulated carried on and did overt acts charged to bring about the isolation of Paradise. The jury had a right and the duty to consider the record as a whole and determine who, if any, were participants in an unlawful combination." 1958 Trade Cases, ¶69,139 at pp. 74,457-58 (Ninth Cir. 1958).

POINT II

THE EVIDENCE OF TEXTURA'S RELIANCE UPON DEFENDANTS FOR ITS PRIMARY FABRICS AND THE INABILITY TO SECURE THOSE FABRICS, THE DEFENDANTS' ADMISSION THAT TEXTURA COULD NOT OPERATE WITHOUT THEIR EXTENDED CREDIT TERMS, THE FACT THAT TEXTURA CONSEQUENTLY WAS UNABLE TO FILL EXISTING AND FUTURE ORDERS AND CONTRACTS, WAS SUFFICIENT TO SUPPORT THE JURY'S FACTUAL DETERMINATION THAT THE DEFENDANTS' CONSPIRACY WAS A PROXIMATE CAUSE OF TEXTURA'S DAMAGE

Not only was there a reasonable basis for concluding that the Defendants conspired to force TEXTURA out of business, but, there was also sufficient evidence to support the finding of the jury* that such conspiracy was a proximate cause of TEXTURA going out of business.

It is hornbook law that BURLINGTON and CLARK-SCHWEBEL, as co-conspirators, were responsible for, and chargeable with, any acts which either did in furtherance of the object or purpose of their conspiracy. Accordingly, the acts of BURLINGTON and CLARK-SCHWEBEL, whether individual or joint, should be analyzed collectively or as if they were performed by a single entity. Similarly, as noted in Continental Ore Co. v. Union Carbide Corp., 370 U. S. 690, 699 (1962), where the issue before the Court was the alleged insufficiency of the evidence to justify a jury finding that

^{*}Interrogatory No. 3 submitted by the Court to the jury was answered in the affirmative: "Was the conspiracy a proximate cause for TEXTURA going out of business?" [App.].

the illegal acts of the defendants caused the plaintiff's demise, the Court held that the joint acts of the Defendants should be viewed as a whole:

"In cases such as this [antitrust], plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each... the character and effect of a conspiracy are not to be judged by dismembering its separate parts, but only by looking at it as a whole."

In connection with such analysis, the applicable standard for determining the sufficiency of the evidence with respect to the "fact of damage" or whether the conspiracy was the cause of TEXTURA'S demise is whether:

"...the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, the defendants' wrongful acts had caused damage to the plaintiffs." Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264 (1945) [Emphasis Supplied].

This rule has been further refined by the Supreme Court in Zenith Radio Corporation v. Hazeltine Research, 395 U.S. 100, 114 (fn. 9) (1969):

"...[the plaintiff's] burden of proving the fact of damage under §4 of the Clayton Act is satisfied by its proof of <u>some</u> damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury..."

See also Trans World Airlines, Inc. v. Hughes, 308 F. Supp. 679

(S.D.N.Y. 1969): Kobe, Inc. v. Dempsey Pump Co., 198 F. 2d 416 (10th Cir. 1952); Mechanical Contractors Bid Depository v. Christiansen, 352 F. 2d 817 (10th Cir. 1965); and Elyria-Lorain Broadcasting Co. v. Lorain Journal, 358 F. 2d 790 (6th Cir. 1966). In addition, to establish the fact of damage, it is sufficient to prove that the defendants' conduct was a substantial or material cause of some injury to the plaintiff; it is not necessary to show that defendants' conduct was the sole or predominate cause of the injury or that it was a more substantial cause of harm than any other known cause. Haverhill Gazette Company v. Union Leader Corp., 333 F. 2d 798 (1st Cir. 1964); Vandervelde v. Put and Call Brokers and Dealers Association, 344 F. Supp. 118 (S.D.N.Y. 1972). Moreover,

"The degree of certainty required of a plaintiff in proving causation of damage *** varies with the nature of the case. A degree of uncertainty may always be permitted, especially when the circumstances made it particularly likely that the claimant suffered loss at the wrongdoer's hands". Haverhill Gazette Company v. Union Leader Corporation, supra, 806 (fn. 16) (Citations omitted).

and

"...while a fair degree of certainty is still essential to show the causative relation of defendants' misconduct and plaintiff's injury, yet in an antitrust suit, covering as it must many imponderables, rigid standards of precise proof would make a plaintiff's task practically hopeless." Id., 804.

Finally, proof of causation is not limited to direct evidence and circumstantial evidence may be relied upon to infer a causal relation between illegal conduct and injury. Zenith Radio Corp. v. Hazeltine Research, supra.

Within the context of the foregoing rules, it is submitted that TEXTURA offered sufficient evidence from which the jury could find that the collective acts of the Defendants, viewed as a nonsegmented whole, forced TEXTURA out of business and that the conspiracy of the Defendants to refuse to deliver usable fabric to TEXTURA and/or to restrict the extended credit terms previously given to TEXTURA was a proximate, material or substantial cause of TEXTURA'S failure. At the very least, there was evidence of some damage or a tendency toward some damage to TEXTURA sufficient to establish the fact of damage.

T continue its operations, TEXTURA required fiberglass fabrics sold on extended credit terms. Prior to the inception of the conspiracy, CLARK-SCHWEBEL and BURLINGTON, as the primary sources of TEXTURA, sold substantial quantities of fiberglass fabrics to TEXTURA on extended credit terms. The extended credit terms were necessary because of the length of time which elapsed between the date when TEXTURA ordered fabric and the point in time when TEXTURA would be paid by the contractor or owner of a high rise building in which draperies and related hardware were installed (frequently a month after the drapery fabrics had been installed) [Tr. 141; App.]. Moreover, during this period, TEXTURA had to ship the fabric to its converter, have the fabric converted and fabricate the draperies. As POWRIE testified, extended credit terms were "the basis for operation. We could not operate without it." [Tr. 191; App.]. Indeed, the complete dependence

of TEXTURA on the extended credit terms of the Defendants was admitted by them:

"...Mr. POWRIE didn't go to a bank. You will remember that this company was always thinly capitalized, it didn't have any money. Bankers have a funny way about them. They don't lend you money unless you can prove you don't need it. So he couldn't go to a bank to borrow money. He got his money from the defendants. Each defendant regularly permitted him to take a very, very long time to pay the bills. They didn't insist on payment on time. They gave him more and more and more and more. Without those extraordinary terms, those extraordinary grants of time in which to pay, which each defendant gave him, Mr. POWRIE could never have operated." [Tr. 2174; Apr.] [Emphasis Supplied].

Notwithstanding the foregoing, once agreement was reached and the conspiracy implemented the conduct of the Defendants with respect to TEXTURA radically changed. The Defendants eliminated extended credit terms with respect to fabric purchased from CLARK-SCHWEBEL and placed TEXTURA on a cash basis. [Tr. 419; App.]. From that point on, TEXTURA was no longer permitted to defer payment for CLARK-SCHWEBEL fabric until it installed the fabric and received payment from its contractors. With respect to fabric obtained from BURLINGTON, the Defendants restricted the previous extended credit terms of TEXTURA and reduced the amount of time within which TEXTURA was required to pay for fabric purchased.

In addition to restricting its credit, the Defendants also reduced the amount and the number of styles of the fabric which they sold to TEXTURA. The limitation by the Defendants on the amount of fabric sold to TEXTURA was both a function of their conspiratorial intent as well as (and in conjunction with) the inability of TEXTURA to comply with the Defendants' restricted/eliminated credit terms.

The only deliveries of fabric by CLARK-SCHWEBEL after March, 1966 (all on a C.O.D. basis) were as follows [DX-CK; App.]:

MONTH (1966)	DELIVERIES	
March April	None None	
May June	Approximately Approximately	
July August	Approximately None	
September October	Approximately Approximately	
November December	Approximately None.	\$1,800

Consequently, as POWRIE testified, TEXTURA was "out of business as far as any fabrics from CLARK-SCHWEBEL was concerned". [Tr. 420; App.]. Defendants' conduct with respect to BURLINGTON fabric was similarly onerous. "Crown" fabric, manufactured solely by BUR-LINGTON, was one of TEXTURA'S most popular fabrics and critical to its operations. During the first six months of 1966, TEXTURA purchased approximately \$66,000 yards of "Crown" from BURLINGTON [PX 829; App.]. In April, 1966, despite the fact that TEXTURA was "in desperate need for Crown" [Tr. 1930; App.] and was "screaming for it" [Tr. 361; App.], BURLINGTON cancelled a TEXTURA order for \$30,000 of "Crown" [Tr. 363; App.]. Although some "Crown" was delivered during the months of April through July, 1966, in August and September no deliveries were made and thereafter less than 3,000 yards were delivered, which deliveries came in November [PX-829; App.]. In fact, in April and May, BURLINGTON refused to accept orders from TEXTURA*. As a result, for all intents and purposes,

BURLINGTON completely deprived TEXTURA of "Crown". In fact, deliveries of all of BURLINGTON'S fabrics to TEXTURA substantially ceased after July of 1966 [PX 829; App.]. Thus, POWRIE testified that [Tr. 852; App.]:

- "A. We basically had no fabrics from either Burlington or Clark-Schwebel we could sell to generate cash with. We had some, but very little.[*]
- Q. And at that time were you receiving extended credit terms from the defendants?
- A. No, they had shut down extended credit terms. We were on a much shorter time, so we had to pay out more cash for that."

Furthermore, not only were the sales of fabric to TEXTURA limited by the Defendants, but, in addition, the quality of the small amount of fabric which was sold to TEXTURA was poor and therefore unusable. POWRIE could not get a guarantee of production to enable him to make future sales. [Tr. 1925-1931; 631; App.].

Thus, POWRIE testified [Tr. 408; App.]:

"Well, we talked about Crown in November, 1965[sic**] and he [ERSKINE of BURLINGTON] made the statement that HESS-GOIDSMITH would go back to working it, but they wanted more money for it. These things didn't register much in November, because we were down the tubes. Whatever it was, whatever it was, whatever he showed me it was unacceptable, and I remember making the remark, 'well, you finally put me out of business'."

^{*}See also the testimony of Mr. ALONZO as to the need for Crown" in connection with the Harbour General Hospital job [Tr. 1925 et seq.; App.] and the specification of "Crown" in connection with jobs listed in the job status reports, infra. **1966.

With respect to two large jobs* [Tr. 377; App.]:

"...TEXTURA couldn't get any usable quality of either Crown or Satin Boucle which the owner was willing to accept out of any of these shipments after July."

See also PX 537; App.

The ultimate result of the Defendants' restriction and/or elimination of credit and reduction of usable fabric to TEXTURA was that TEXTURA was forced to go out of business. More specifically, the joint conduct of the Defendants made it impossible for TEXTURA to continue to sell fiberglass draperies as was indicated by POWKIE'S statements to the Defendants in September and November, 1966:

"He [POWRIE] stated that his sales for the months of June/July/August were very poor. This was largely due to the fact that BI [BURLINGTON] stopped weaving a fabric known as "Crown" which represented 40% of his volume." [PX 198; App.].

* * * * * * * * *

"He [POWRIE] stated that we [BURLINGTON] are difficult to deal with from a credit standpoint and that of even more importance, our poor quality and lack of inventory on 94622 [Satin Boucle] and 6011 [Crown] is largely responsible for his decrease in sales."

[PX 537; App.].

The Defendants would no longer sell TEXTURA the quantity and quality of fabric which it needed. Accordingly, not only could TEXTURA not meet the contractual obligations it had with its customers, but, it was *American Dental Association Building and Loyola University in Chicago, Illinois.

hampered in securing new business because the Defendants could no longer be relied upon to deliver the necessary fabric. Indeed, even if fabric were delivered, there was the increasing probability that it would not be usable. With the inability to fulfill existing contracts or obtain new ones, TEXTURA was unable to generate cash to purchase fabric from CLARK-SCHWEBEL or meet the restricted credit terms of BURLINGTON. The culmination of this vicious circle was a decline in sales and TEXTURA'S demise.

The evidence that the Defendants' conspiracy resulted in the failure of TEXTURA'S business is clear. In addition to the above-cited testimony and exhibits, the fact of damage was proven by the orders or invoices, contracts and jobs which TEXTURA was unable to fill, perform or complete in 1966* as a consequence of its inablity to obtain usable fabric from the Defendants and by the reduction in the amount of TEXTURA'S sales in 1966.

As of December, 1966, TEXTURA had approximately \$5,500 worth of small orders or invoices which could not be filled because of the inability to obtain fabrics from the Defendants. [PX 843, 844; App.]. These untilled invoices represented piecemeal and completion orders which were not a substantial part of TEXTURA'S business. In connection with these orders, POWRIE testified [Tr. 531; App.]:

"...if we didn't fill the order, it meant that we didn't have the fabric."

^{*}The unfilled invoices and uncompleted contracts and jobs, including those relating to periods after 1966 and those which utilized fabrics other than Defendants, are discussed in connection with damages, POINT III, infra.

Similarly, as a result of the inability to obtain usable fabric from Defendants, approximately \$39,175 in contracts which TEXTURA had outstanding in 1966 could not be completed:

CONTRACT	FABRIC	AMOUNT
U. S. Navy	Satin Boucle	\$5,000 [PX 851; App.]
U. S. Navy	Crown	\$6,000 [PX 851; App.]
Loyola University	Satin Boucle	\$13,000 [PX 852; App.]
St. Simone Church	Satin Boucle (part)	\$675 [PX 852; App.]
Glendale Savings	Morro	\$10,000 [PX 854; App.]
Benedictine Hospital	Crown	\$2,100 [PX 628; App.]
Beverly Glenn	Satin Boucle	\$2,400 [PX 855; App.]
	TOTAL	\$39,175.

Finally, because TEXTURA could not obtain usable fabric from the Defendants, the following jobs*, to be completed in 1966, were not finalized:

JOB	FABRIC	AMOUNT	
San Francisco Housing Authority	Golden Gate	\$5,900 [PX 851, 123; App.]
Reno Housing Authority	Crown	\$12,000 [PX 851; App.]	
Oakland Housing Authority	Golden Gate	\$15,000 [PX 851, 123; App.	1
Arlington Heights	Homespun	\$3,800 [PX 832; App.]	
Chamberlain	Golden Gate	\$15,000 [PX 854, 123; App.]
	TOTAL\$51,700.		

^{*&}quot;Jobs" refers to potential contracts with respect to which TEXTURA made bids and in most instances, was awarded the contract. See discussion in connection with damages, POINT III, infra.

In addition to these jobs, the Defendants' failure to deliver usable fabric to TEXTURA also resulted in the probable loss of 70% of the fo'lowing jobs to be completed in 1966 (where the type of fiberglass fabric was not specified) because CLARK-SCHWEBEL and BURLINGTON, as TEXTURA'S primary sources of fabric, provided in the year prior to the conspiracy 70% of TEXTURA'S fiberglass fabric [PX 884; App.]

JOB	AMOUNT	
Jules Stein Clinic	\$18,000 [PX	854; App.]
UCLA Irvine	\$18,600 [PX	854; App.]
Bank of California	\$47,000 [PX	628; App.]
Shaker Racquet Club	\$ 1,500 [PX	628; App.]
TOTAL	\$84,500. (x	70% = \$59,150

Defendants' conspiratorial conduct also caused the following dramatic decline in sales, ultimately resulting in TEXTURA'S cessation of operations in December, 1966:

MONTH (1966)	SALES
January February March April May June July August September October	\$150,014 [PX 37; App.] \$149,925 [PX 38; App.] \$150,659 [PX 39; App.] \$140,776 [PX 40; App.] \$152,412 [PX 41; App.] \$ 60,726 [PX 47; App.] \$103,322 [PX 43; App.]* \$ 13,029 [PX 44; App.]** \$ 30,033 [PX 45; App.]*** \$ 62,213 [PX 46; App.]***

^{*}Deleting an improperly recorded item (the Del Webb job) of \$66,000 [Tr. 865; App. **Deleting \$53,370.21 of the same item remaining improperly recorded (See DX AG; App.

^{].} Approximately \$13,000 was invoiced in August.

***Approximately \$13,000 of the Del Webb job was invoiced in December of 1966.

[PX 848; App.]. Assuming that the approximate 53,000 was invoiced at \$26,500 per month then a deduction of \$26,000 from the September statement, and \$13,000 from the October statement would establish a correct figure for recorded sales during these months. By December TEXTURA was out of business.

Thus, the conspiracy of the Defendants resulted in the loss to TEXTURA in 1966 of revenues in the approximate amount of \$155,525* and a decrease in TEXTURA'S sales of approximately \$98,000 from January to October, 1966. Based upon the foregoing evidence, it is clear that:

- (1) CLARK-SCHWEBEL and BURLINGTON were TEXTURA'S primary source of fabric;
- (2) After the inception of the conspiracy CLARK-SCHWEBEL and BURLINGTON restricted and/or eliminated TEXTURA'S credit and reduced the quantity and quality of the fabrics supplied to TEXTURA;
- (3) As a result of the Defendants' acts, TEXTURA was unable to obtain fabric and consequently could not fill contracts or complete jobs in 1966, could not rely on fabric from Defendants in connection with securing future business and suffered a significant reduction in its sales;
- (4) Under these circumstances, TEXTURA had no alternative but to make an assignment of its assets for the benefit of creditors in December, 1966.

Accordingly, there was clearly sufficient evidence from which the jury could conclude that the conspiracy of the Defendants was a proximate cause of TEXTURA going out of business.

The arguments of the Defendants do not support a different conclusion. In response to the fact of TEXTURA'S inability to obtain fabric, Defendants maintain that (1) TEXTURA could have obtained the fabric from STEVENS which BURLINGTON and CLARK-SCHWEBEL refused to sell, (2) BURLINGTON had an inventory of fabric for TEXTURA which TEX-

*	Invoices\$	5,500
	Contracts\$	39,175
	Specified Jobs\$	51,700
	Unspecified Jobs\$	59,150

TOTAL....\$155,525.

TURA did not call out, and (3) TEXTURA'S inventory increased in 1966.

With respect to Defendants' first contention, STEVENS primarily sold fiberglass fabrics used by TEXTURA for resale to decorators and not the type of fiberglass fabric which TEXTURA needed and obtained from CLARK-SCHWEBEL and BURLINGTON in connection with the major segment of its business, high rise building contract jobs. [Tr. 698; App.]. Moreover, STEVENS alone could not supply TEXTURA with the quantity of fabric (and credit) which was previously sold (and extended) by STEVENS, BURLINGTON and CLARK-SCHWEBEL. Finally, when TEXTURA in fact asked STEVENS to weave one fabric which had been woven by Defendants (Morro, a BURLINGTON fabric, which TEXTURA used for high rise contract jobs), STEVENS could not or would not weave the fabric [Tr. 374-375; App.]. Accordingly, in the absence of TEX-TURA'S two major suppliers, neither STEVENS nor any other manufacturer could have supplied TEXTURA with sufficient fabric for it to remain in business.

The fact that BURLINGTON "had large inventories of fabrics for TEXTURA"* during the post-July, 1966 period which TEXTURA did not call out is similarly not persuasive. As indicated, supra, whether because of TEXTURA'S inability to meet the restricted credit terms imposed by the Defendants with respect to BURLINGTON fabric or because BURLINGTON simply refused to deliver, TEXTURA could not obtain sufficient amounts of "Crown" from BURLINGTON. Similarly, it is clear, *BURLINGTON Brief, POINT II.

<u>supra</u>, that TEXTURA unsuccessfully sought to obtain fabrics from CLARK-SCHWEBEL. Consequently, both directly and indirectly, the Defendants refused to sell fabric to TEXTURA.

Finally, the argument by Defendants that TEXTURA had "large and growing inventories of fabrics"* is both misleading and irrelevant. TEXTURA'S inventory was neither large nor growing. As indicated by the balance sheets for the months of January to October, 1966**, TEXTURA'S inventory was certainly not increasing, nor was it large in comparison to the inventory in January and February, 1966. In fact, from January, 1966 to October, 1966, TEXTURA'S inventory decreased by approximately \$40,000. Moreover, there is no evidence that the inventory figures contained in the balance sheets of TEXTURA reflected inventory of fabric (vis a vis other assets) [Tr. 861-862; App.] as alleged by Defendants and even if the inventory figure did reflect quantities of fabric,

**	LINGTON Brief, POINT II. MONTH (1966)	INVENTORY (\$000)
	January	228 [PX 37; App.]
	February	217 [PX 38; App.]
	March	198 [PX 39; App.]
	April	191 [PX 40; App.]
	May	257 [PX 41; App.]
	June	181 [PX 47; App.]
	July	172 [PX 43; App.]
	August	176 [PX 44; App.]
	September	185 [X 45; App.]
	October	187 [PX 46; App.]

There was no inventory figure introduced in evidence with respect 1966. November or December, 1966.

a portion of such fabric was probably unusable, <u>supra</u>. Therefore, notwithstanding the Defendants' arguments, TEXTURA established that it had no alternative source of fabric and that the Defendants did in fact refuse to deal. Furthermore, the size of the inventory of TEXTURA is not probative of any conclusion and therefore is irrelevant.

Defendants also argue that the actual cause of TEXTURA going out of business was that TEXTURA'S factor, DOMMERICH, cancelled its factoring arrangement with TEXTURA. Simply stated, DOMMERICH continued to factor TEXTURA'S accounts until TEXTURA went out of business [Tr. 691; App.] and therefore could not have been the cause of TEXTURA'S failure. Furthermore, the Defendants admit that TEXTURA was dependent upon them for financing, not DOMMERICH [Tr. 2174; App.]. In any event, had DOMMERICH cancelled its factoring arrangement, such cancellation would have been a consequence of TEXTURA'S poor financial condition which was a direct result of the Defendants' conspiracy, not a superseding causative factor.

The facts in the instant case closely parallel those in Vandervelde v. Put and Call Brokers and Dealers Association, 344 F. Supp. 118 (S.D.N.Y. 1972). In Vandervelde, the plaintiffs (brokers and dealers engaged in buying and selling options) were suspended from the Brokers And Dealers Association. The plaintiffs commenced an action against the Association alleging that their suspension was a violation of \$\$1 and 2 of the Sherman Act. The damages sought were

for the termination of the plaintiffs' business which resulted from plaintiffs' loss of their major source of options and customers when member firms of the New York Stock Exchange refused to deal with plaintiffs because of the plaintiffs' suspension from the Association. The defendants, as here, contended that the termination of the plaintiffs' business was a consequence of economic failure and therefore no fact of damage had been established. The Court held that:

"...the loss of the prospect of patronage of these firms [plaintiffs' major source of purchased options] was a substantial or material cause of the failure of ...[plaintiffs'] business as an option broker-dealer...When all of the proof offered by the parties is looked at together, the suspension still appears to have been a substantial factor in the drop in volume of options and income earned which occurred after August, 1963 and it cannot be said that that downturn was merely a continuation of the earlier revers; the business suffered. The factors defendants emphasize are not without significance, since they affect directly the value which can be placed upon the expectations of profitability which plaintiffs might have legitimately possessed during August, 1963. But, these factors do not suffice to render meaningless or insignificant the further reductions which resulted from the suspension or the effect of these further losses on Vandervelde's further prospects.

Even allowing the evidence presented by the defendants its fullest possible weight, the suspension was a material cause of Vandervelde's decision to leave the put and call business. Although the business may already have been in poor condition economically to endure further reversals, the suspension was a reversal for which the defendants were responsible and, at the time, it appeared that this reversal could only be cured by... [plaintiffs'] readmission into the Association." Vandervelde v. PACABADA, supra, 144-146.

Thus, the plaintiffs' loss of their source of options (the commodity sold by the <u>Vandervelde</u> plaintiffs) was held to be a material, substantial or proximate cause of the termination of their business, regardless of its coincidence with an economic decline. TEXTURA similarly established that the loss of sources for its commodity

(usable fabrics on extended credit terms) caused its termination. Accordingly, regardless of the Defendants' allegations that other factors caused TEXTURA to fail, there was sufficient evidence to warrant the jury's conclusion that the conspiratorial conduct of the Defendants was a proximate cause of TEXTURA'S demise. As indicated, supra, TEXTURA merely had to establish that the conspiracy was a proximate, material or substantial cause of its injury. It was not necessary to prove that the conspiracy was a more substantial cause than any other or to exclude all other possible causes which may have contributed to TEXTURA'S termination. Indeed, the burden to prove that factors other than the conspiracy were the material, substantial or proximate cause of TEXTURA'S termination was on the Defendants (Haverhill Gazette Company v. Union Leader Corporation, supra; Elyria-Lorain Broadcasting Co. v. Locain Journal Co., supra; Bigelow v. RKO Radio Pictures, supra; Vandervelde v. PACBADA, supra), and the jury clearly found that the Defendants did not meet this burden. Further, the Defendants are responsible for the consequences of their acts with respect to TEXTURA as it existed and may not avoid liability for their illegal conduct merely because their activities are directed at a business which is just commencing the realization of profits from prior startup expenditures:

"To deny recovery to a businessman who has struggled to establish a business in the face of wrongful conduct by a competitor simply because he never managed to escape from the quicksand of red ink to the dry land of profitable enterprise would make a mockery of the private antitrust remedy." (Terrel v. Household Goods Carriers' Bureau, 494 F. 2d 16, 23 (5th Cir. 1974)).

Causation or the fact of damage is established if the Defendants' conduct was a substantial cause of the Plaintiffs' damage. Here, the Defendants, jointly and in furtherance of their conspiracy, restricted and eliminated the credit of TEXTURA and refused to sell TEXTURA the quantity and quality of fabric which TEXTURA had obtained prior to the conspiracy. TEXTURA, as a result, was unable to complete existing orders and contracts or secure future business and ultimately was forced to cease operations. Therefore, as set forth above, there was sufficient evidence introduced at trial from which to conclude, and it was clear to the jury that, the Defendants' conspiracy was a proximate cause of TEXTURA'S going out of business.

POINT III

TEXTURA'S FINANCIAL STATEMENTS FOR THE PERIOD FROM 1958 THROUGH 1966, TEXTURA'S SALES ANALYSES, DOCUMENTS SHOWING UNFILLED, EXISTING AND FUTURE ORDERS AND CONTRACTS, THE TESTIMONY OF EXPERT WITNESSES AS TO SALES FORECASTS AND INCOME PROJECTIONS, AND INCOME PROJECTIONS PREPARED BY A TEXTURA EMPLOYEE, CONSTITUTE SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S AWARD OF DAMAGES

The damages sought by TEXTURA at trial were the net profits which were lost as a consequence of TEXTURA being forced out of business by the Defendants' illegal conduct. To establish the amount of lost profits, TEXTURA introduced various exhibits* and, in connection therewith, the testimony of: (a) TEXTURA'S expert witnesses, Dr. BRUNER and Dr. MOSICH, with regard to the projections of TEXTURA'S sales and net profits (respectively) for the years 1967 through 1976, (b) Mr. FRIEDMAN regarding income projections for TEXTURA for 1966, and (c) Messrs. POWRIE, FRIEDMAN and ZIMMERMAN with

^{*}Inter alia; (1) Internal year end financial statements of GLASS FABRICS, INC. (1958) [PX-810; App.]; (2) Year end financial statements of GLASS FARRICS, INC. and TEXTURA prepared by independent auditors (1959-1965) [PX-811, 812, 813, 13, 15, 20, 36; App.]; (3) Financial statements of TEXTURA for the six month period ending June 30, 1966 [PX-47; App.]; (4) TEXTURA sales projection report for 1967-1976 by Dr. JOHN BRUNER [PX-871, 871-A; App. (5) TEXTURA net profit or income projection report for 1967-1976 by Dr. MOSICH [PX-873; App.]; (6) 1966 income projections for TEXTURA of ALLEN FRIEDMAN [PX-48; App.]; (7) Analysis of TEXTURA sales by territory (1962-1966) [PX-881, 880, 879, 858, 864; App.]; (8) Unfilled purchase orders of TEXTURA in 1966 [PX-843; 844; App.]; (9) Potential contracts or working jobs of TEXTURA in 1966 [PX-254, 855; App.]; (10) Unfinished contracts of TEXTURA in 1966 [PX-587, 591, 848, 845, 846, 586; App.]; (11) Job status reports of TEXTURA for San Francisco, Chicago, Texas, Ios Angeles, and New York [PX-851, 853, 854, 628; App.].

respect to the sales analyses and potential business of TEXTURA. From this evidence, the jury determined the net profits TEXTURA would have realized had it remained in business. The issue presented for determination therefore is whether such evidence constituted a sufficient basis for the jury to award TEXTURA damages in the amount of \$531,617. It is submitted that the foregoing evidence was clearly sufficient to support this jury award.

A. THE PROFIT PROJECTION OF DR. MOSICH PREDICATED ON THE SALES PROJECTION OF DR. BRUNER WAS SUFFICIENT EVIDENCE OF DAMAGE

The projection of sales which TEXTURA would have made during the years 1967 through 1976 if it had not been forced out of business [PX-871*; App.] was prepared by Dr. JOHN M.

BRUNER. Dr. BRUNER was an associate professor of business economics at the University of Southern California with a masters degree in science and a masters and doctorate in business administration. He had been employed by many reputable companies as a business consultant to make sales projections [Tr. 1213-1217; App.]. The methodology employed by Dr. BRUNER in connection with his sales projections was as follows:

(1) Ascertain from the sales analyses of TEXTURA or TEX-

^{*}It should be noted that portions of the tables in the original report were revised by Dr. BRUNER [PX 871-A; App.]. However, such revisions altered the original figures by less than fourteen one hundredths of one percent (.0014) [Tr. 1834; App.] and did not significantly affect the original projections [Tr. 1832; App.].

TURA'S "spread sheets" [PX's-881, 880, 879, 858 and 864; App.]* the dollar amount of sales made by TEXTURA in California for the years 1962 through June, 1966; (2) determine the percentage ratio of such sales by TEXTURA for the year 1962 through 1966 to dollar sales for the years 1962 through 1966 in California in connection with the industry or market of "DRAPER" HARDWARE AND BLINDS AND SHADES" (as represented in the U. S. Department of Commerce Census Of Manufacturers data for SIC 2591**) (hereinafter referred to as SIC 2591); (3) compute the average of the TEXTURA/California SIC 2591 percentage ratios for the years 1962 through 1966, which average represents TEXTURA'S percentage share in the California market of SIC 2591 (or "EXTURA'S "market share") ***; (4) multiply nationwide sales in the nationwide SIC 2591 market for the years 1967 through 1976 (as set forth in the U. S. Department Of Commerce Census of Manufacturers data, supra) by TEXTURA'S (percentage) market share to project the dollar amount of sales TEXTURA would have had in the years 1967 through 1976 had it not been forced to terminate its business****.

Based on the sales which Dr. BRUNER projected for the

^{*}The sales analyses indicated the amount of TEXTURA'S sales, by geographic territory for the years 1962 through 1966.

^{**}Annexed to PX 871; App.

^{***7.3% [}PX-871A (p.4); App.].

^{****}Various mathematical interpolations were required which are more fully explained in the report. In addition, adjustments were made to the national sales figures for SIC 2591 to compensate for the time it would take for TEXTURA to attain a nationwide market, infra.

years 1967 through 1976, Dr. A. N. MOSICH projected the corresponding net income or profits TEXTURA would have earned from such sales in those years [PX 873; App.]. Dr. MOSICH was a certified public accountant and a professor of accounting at the University of Southern California with a masters degree in business administration and a doctorate in accounting. He is the author of numerous books and articles on accounting and performs consulting services [Tr. 1281-]. Dr. MOSICH reviewed the books and records of TEXTURA for the period 1964 through June 30, 1966, with particular emphasis on the last six months, and concluded that TEXTURA'S books and records were generally reasonably maintained [Tr. 1286;] and that the unaudited June 30, 1966 income statement [PX-47; App.] was prepared in accordance with generally accepted accounting principles for interim financial statements [Tr. 128 -1288;]*. Based on TEXTURA'S income statement for the six month period ending June 30, 1966 [PX-47; App.], Dr. MOSICH ascertained the relationships between sales, gross profits, costs, fixed expenses and variable expenses and applied these relationships in conjunction with various reasonable assumptions [See Tr. 1299-1303; App.] to the sales projections of Dr. BRUNER for the years 1967 through 1976 for the purpose of projecting the net income or profits which TEXTURA would have realized for each year during that ten year period. The projections of Dr. BRUNER and Dr. MOSICH, predicated on the aforementioned exhibits includ-*As did Mr. ZIMMERMAN [Tr. 1040, et seq.,; App.

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ing the data contained in the U. S. Department Of Commerce Census of Manufacturers, concluded that TEXTURA'S sales and net profits in the years 1967 through 1976 would be as follows* [PX 871A, 873; App.]:

YEAR	SALES (\$000)	NET PROFIT (\$000)
1967	3,617	532
1968	8,219	1,559
1969	12,988	2,606
1970	18,982	3,930
1971	25,603	5,384
1972	26,643	5,562
1973	28,162	5,848
1974	29,767	6,148
1975	31,464	6,459
1976	33,258	6,855

Defendants do not dispute the procedure utilized by

Dr. MOSICH in projecting TEXTURA'S net profits or his calculations**

except to the extent that the same are based upon the sales projections of Dr. BRUNER. With respect to the sales projections, Defendants contend that (1) there was no support for Dr. BRUNER'S assumption that TEYTURA was "on the verge of achieving substantial penetration of the national market"*** and that (2) SIC 2591 was not an accurate predictor or the relevant market for projecting the sales of TEXTURA because (a) the annual sales of household decorative fiberglass fabrics was a better indicator of TEXTURA'S sales than SIC 2591, and (b) there was no evidence of a correlation between

^{*}Assuming TEXTURA would attain its ultimate market share in five (5) years.

^{**}BURLINGTON Brief, POINT III, fn. 54 and fn. 59.

^{***}BURLINGTON Brief, POINT III, fn. 56.

TEXTURA'S fiberglass business and SIC 2591.

(1) THERE WAS A REASONABLE BASIS FOR ASSUMING THAT TEXTURA WOULD ATTAIN A NATIONWIDE MARKET.

In projecting the sales of TEXTURA, Dr. BRUNER made the assumption that TEXTURA would attain a nationwide market (vis a vis having sales only in California) within three (3) or five (5) years after 1966*. The basis for this assumption was stated by Dr. BRUNER as follows [Tr. 1235; App.

"I have two different sets of projections of sales. One is based on the assumption that TEXTURA would receive this ultimate market share, this national position, if you would, with respect to the industry, as I have defined the industry [SIC 2591], in three years. And the other is based on the assumption that they would not attain this 7 per cent [the average percentage market share of TEXTURA in California sales to SIC 2591 sales in California for the years 1962-1966, supral of this industry until five years. The reason for the five years is simply that it is a more conservative estimate. The reason for the three years is the fact that the experience in California for TEXTURA was such that they started in 1962, or their sales in 1962 were about 6-some percent. In 1963 it went to 7.7 per cent. So they did effectively achieve this level of sales in a very short period of time. Therefore, it is reasonable to assume that they would achieve the national market in that same period of time, particularly since they had their sales force, their sales organization, product line et cetera, very well established at the time of 1966. [**]"

^{*}As a result of this bifurcated assumption, two (2) sets of sales projections were made by Dr. BRUNER [PX 871A (p.6); App.].

^{**}See Tr. 115-121, 208-211, 1794; App.

Accordingly, a reasonable basis existed for assuming that TEXTURA would attain a nationwide sales market at least by 1971 and logical adjustment was made in the SIC 2591 national sales figures to compensate for the lesser amount of sales in the years before TEXTURA was projected to attain such market. Moreover, Defendants adduced no evidence which would controver or undermine this assumption which was made, and justified, by an economist experienced in the art of sales projections and forecasting.

(2) SIC 2591 WAS THE RELEVANT MARKET FOR PREDICTING TEXTURA'S SALES

The selection of SIC 2591 as the relevant market or predictor for TEXTURA sales was based upon the fact that TEX-TURA was in the unique business of selling and installing fiberglass draperies and related drapery hardware directly to high rise office buildings and high rise apartments as a subcontractor in the building trade. [See Statement Of Facts, supra, Tr. 78-89, 116, 192-197; PX 57, 851, 852, 854, 855, 628; App.]. As POWRIE testified, this market had been dominated by venetian blinds with which drapery fabrics did not compete because of the lack of heat shade data. TEXTURA entered this field and competed against blinds by developing comparable data for drapery fabrics. [Tr. 87-90; App.]. Accordingly, the jury could have found that the market of Drapery Hardware and Blinds And Shades was the most appropriate market for predicting TEXTURA sales. Furthermore, as Mr. POWRIE stated, there was virtually

no other company of TEXTURA'S stature which conducted a similar business [Tr. 155-156; App.]. Alternatively therefore, since TEXTURA was not part of any standard or readily definable market, SIC 2591 could be utilized as a <u>substitute</u> market to project the sales of TEXTURA. Dr. BRUNER, an independent expert in sales forecasting, testified that SIC 2591 was the most accurate predictor for, and the best approximation of TEXTURA'S sales [Tr. 1222, 1223, 1231, 1233; App.].

(a) ANNUAL SALES OF DECORATIVE FIBER GLASS FABRICS WAS NOT A BETTER INDICATOR OF TEXTURA'S SALES THAN SIC 2591.

Defendants maintain that GIC 2591 should not have been used to project TEXTURA'S sales because annual sales of household decorative fiberglass fabrics was a more representative market. This alternative market which Defendants contend should have been utilized, primarily (for the years 1964-1973) reflected the number of linear yards of household decorative fiberglass fabrics which were produced (vis a vis sold) in the industry and was merely a minor part (vis a vis a specific industry such as SIC 2591) of the general industry or "market" of "Broadwoven Fabrics Finished" [DX]. As indicated, supra, although TEXTURA CJ, AK-AL; App. sold decorative fiberglass fabrics, its primary business was not with respect to the sale of household fabrics. TEXTURA basically installed and sold fiberglass draperies and related drapery hardware to high rise office and apartment buildings (as opposed to retail sales of decorative household fiberglass fabrics). Moreover, the proposed alternative of the Defendants concerned the number of yards of fabric produced in the industry without any proof that the production of

fiberglass fabric necessarily related in any way to the amount of fabric sold. Therefore, the alternative market proposed by Defendants was less representative than SIC 2591, if representative at all. In any event, fully aware of this alternative market [Tr. 1249; App.] Dr. BRUNER nonetheless utilized SIC 2591 in projecting TEXTURA'S sales and stated on cross examination [Tr. 1255-1256; App.]:

"Q. Right.

All right, professor. Now, you compared TEXTURA'S sales with sales of hardware and related items[*] is that right, because you thought that was most accurate?

- A. Of blinds and shades, yes, correct, because that is window coverings, and because that is more representative of the commercial type of business as opposed to household which you have referenced which there [sic] [TEXTURA'S] thrust was decidely not toward this household market at all. To the contrary, in fact, away from that.
- Q. The business TEXTURA was in was selling glass fabric curtains and related products, right?
- A. Those are the products. The business they were in is a very difficult notion. That is, the perception of the buyer, and that means a window covering notion, which they had shades, and the like. This would mean their product would substitute for blinds, et cetera, in a rough sense."

and that:

"I have total confidence in the methodology of the approach I used. It is very consistent, it is used throughout the industry. In that regard I have no qualms whatsoever about the sales estimates that are used." [Tr. 1236; App.]

Consequently, not only did Dr. BRUNER as an experienced forecaster and expert in economics believe SIC 2591 was a more representative

^{*}Blinds and shades, two products with which TEXTURA competed. TEXTURA successfully competed with sellers of blinds and shades by using a marketing program which compared the heating and shade coefficients of TEXTURA'S fabrics with blinds and shades. See PX 1; App. .

market than that of the production of decorative fiberglass <u>house-hold</u> fabrics, but in addition, there is no reason (and no proof was adduced by the Defendants) to believe that the production market of decorative fiberglass <u>household</u> fabrics was superior or more representative.

(b) EVIDENCE OF A CORRELATION BETWEEN TEXTURA'S FIBERGLASS BUSINESS AND SIC 2591 WAS ESTABLISHED.

Defendants' contention that there was no evidence of a correlation between TEXTURA'S business and SIC 2591 and therefore, that SIC 2591 was not an accurate predictor, is similarly unfounded. On the contrary, the strongest evidence of such correlation was produced - POWRIE'S unimpeached testimony as to his competition with venetian blinds for the high rise office and apartment building market [Tr. 87-90; App.] and the opinion testimony and reasoning, supra, of Dr. BRUNER, which opinion was subjected to intense and extensive cross examination [Tr. 1236-1274; App.] and with respect to which the jury was adequately instructed by the Court [Tr. 2372-2373; App.]. Accordingly, evidence was produced at trial establishing the requisite correlation. The alleged lack of historical correlation between TEXTURA'S sales and SIC 2591 indicated in Defendants' brief* is irrelevant because the figures set forth therein with respect to TEXTURA represent that period of time (pre-1966) when TEXTURA was in its less stable intermediary stage of expansion and such figures end at the point in time (1966) when TEXTURA was "turning the corner" toward profitability [Tr. 115-121, 208-211, 1794; App.] and would have begun to exhibit a

^{*}BURLINGTON Brief, POINT III.

direct correlation with SIC 2591. The fact that Defendants' illegal acts occurred at a point in time before a correlation could be evidenced is not a risk which must be borne by TEXTURA. Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946). In any event,

"...because the decline in volume [of goods sold to the plaintiff by defendant as a result of the antitrust violations] was forcefully brought home to the jury on cross-examination of the expert witness [*] with respect to this aspect of his calculations [analysis of lost profits] and the jury was therefore well aware that he had made no specific assumption regarding the decline in his projections, we cannot hold that the evidence does not, in Wigmore's terms, 'rise to a clearly sufficient degree of value'...'something more than a minimum of probative value', so as to require the trial judge to exclude it from the jury's consideration altogether. 1 Wigmore on Evidence (3rd Ed. 1940) at 409-10." William E. Greene, Food Distributors v. General Foods Corp., 517 F. 2d 635, 665

See also <u>Terrel</u> v. <u>Household Goods Carriers' Bureau</u>, 494 F. 2d 16, 24 (5th Cir. 1974) wherein the Court stated:

"The factual disputes were squarely presented to the jury trying the case. Counsel for the ... [defendant] cross-examined ... [the plaintiff's expert] vigorously, probing and prying at the bases for his conclusion and estimates ... [Defendant] had ample opportunity to discredit ... [the expert] and show the fallacies in his reasoning or testimony. The jury as fact-finder had the task and responsibility of judging the credibility of the witness resolving the conflicting evidence, and assessing the weight of the expert testimony." [Citations omitted].

In support of the above contentions, Defendants rely upon the case of Farmington Dowel Products Co. v. Forster Mfg. Co., 421

F. 2d 61 (1st Cir. 1970) for the proposition that Courts reject the use of a proxy market where no correlation is shown to exist between *As in the instant case. See Tr. 1237-1274; App.

the plaintiff's market and that the predictor or proxy. The expert witness in <u>Farmington</u> attempted to utilize three basically different markets as predictors. The first was the market represented solely by the business of the defendant, Forster, which was rejected by the Court because Forster's business was more varied, more developed and extensive, and more fully capitalized than <u>Farmington</u> and, in addition, was dependent upon illegal monopolistic conduct. With respect to the case at bar, SIC 2591 is not limited to a single business entity.

The second market rejected by the Farmington Court, the gross national product of the United States, was clearly too broad to be an accurate predictor and was therefore appropriately rejected. SIC 2591 does not begin to approximate the breadth of a market represented by the gross national product of the United States. The final market proposed by Farmington's expert, "all manufacturing companies for the same area and years" initially appears to bear the same relationship to Farmington as SIC 2591 bears to TEXTURA. However, it is not possible to assume this fact without knowing the meaning of the term "the same area". It is obvious that the "area" was not limited to the manufacture and sale of wooden skewers, the precise business of Farmington, because since there could be no more appropriate predictor or market, such a market would presumably have been accepted by the Court. Accordingly, it must be assumed that just as the market of the gross national product was rejected because it was too broad and therefore incapable of being sufficiently correlated with Farmington, so too the market of all manufacturing companies for the "same area and

years" was presumably too broad*. Finally, Farmington offered no evidence that its business was comparable to the markets selected by the expert. In contrast, TEXTURA produced the evidence discussed, supra, establishing that SIC 2591 was a comparable market. Indeed, in the opinion of Dr. BRUNER, it was the best predictor or market for TEXTURA'S sales. Accordingly, Farmington is not in point not only because of its factual distinctions, but moreover, because evidence of a correlation between TEXTURA'S market and SIC 2591 was adduced in the case at bar.

Likewise, the rationale of the Court in Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F. 2d 383 (6th Cir. 1962), is not in point. In Volasco, proof of damages consisted of the plaintiff's president (who had no particular expertise) projecting potential sales of rolls of asphalt saturated felt by correlating such sales with actual sales of drums of mopping asphalt. The Court rejected this methodology because (1) aside from an unexplained statement by plaintiff's president that sales of mopping asphalt and asphalt saturated felt were related, there was "no evidence to support the claim that mopping asphalt and felt move in any particular relation to each other" (supra, at 391) and (2) it was not reasonable that plaintiff's sales would increase by 247% (the projected figure) in one year. In contrast, the correlation between SIC 2591 and TEXTURA'S business was supported by the explanation of Dr. BRUNER, an expert in sales forecasting and projecting and the percentage increase of TEXTURA'S projected sales was less than one-fourth (1/4)

^{*}Indeed, the "same area" could refer to geographic area thereby clearly making the market of all manufacturing companies in the same geographic area too broad.

of the increases projected in Volasco.

Similarly, the cases of Wolfe v. National Lead Co., 225 F. 2d 427 (9th Cir. 1955) and Flintkote Co. v. Lysfjord, 246 F. 2d 368 (9th Cir. 1957) are inapposite. In Wolfe, in addition to the fact: (a) that the plaintiff failed to prove the fact of damage; (b) that gross, vis-a-vis net, profits of the plaintiff were being projected, and (c) that the plaintiff merely assumed without substantiation that it would have been able to c ain more titanium and therefore manufacture more paint but for the defendants' conduct (none of which parallel the instant case), the Court dismissed the plaintiff's action on the ground that there was no evidence that the conditions of supply and demand in the market remained constant. In contrast, by using SIC 2591 as a predictor of TEXTURA'S market, the economic forces, such as those of supply and demand, were incorporated into the sales projections of TEXTURA. For the same reason, the objection by the Court in Flinthote that there was no evidence of the state of the industry or what similar industries did during the projection period is satisfied by the use of SIC 2591. Consequently, neither Wolfe nor Flintkote support Defendants' argument. To the contrary, Flintkote approves an award of damages which is predicated on expert opinion in turn based on the business records of an injured plaintiff, precisely the evidence offered in the case at bar. Indeed, the primary reason the Flintkote Court reversed on the issue of damages was because:

[&]quot;...the sole evidence as to loss of profits is the testimony of the plaintiffs, both inexperienced in business operations, stating what they had expected to make during the in-

fancy of a newly created enterprise based on inaccurate computations of the most money they had made working as salesmen for an established firm in years preceding those in question, with no attempt having been made to establish a comparison as to either business or the years ..." Flintkote Company v. Lysfjord, supra, at 394.

The expert testimony of Dr. BRUNER and Dr. MOSICH in conjunction with SIC 2591 and the accounting and business books and records of TEXTURA upon which the projections were based would clearly have remedied the <u>Flintkote</u> deficiencies as is indicated by the Court's further comment:

"We do not hold nor imply that a jury verdict could not be upheld, under any circumstances solely on the testimony of the [inexperienced in business] plaintiffs. We hold only that if they are qualified to make these estimates, the record must show their competency and the factual basis upon which they rest their conclusions." Id.

Consequently, the cases cited by the Defendants are not dispositive and do not support the conclusion that SIC 2591 was an inappropriate market. On the contrary, case law indicates that evidence similar, indeed inferior, to that proffered in the instant case, has been deemed sufficient. In <u>William H. Rankin Co. v. Associated Bill Posters of U.S., etc.</u>, 42 F. 2d 152, 155 (2nd Cir. 1930) damages were established by:

"...the testimony of its [plaintiff's] treasurer and by a compilation he had made, based on the net profits of the business in 1911 and from his knowledge of business conditions when, free of the defendants' unlawful interference, what he considered would have been the normal increase of this plaintiff's business from year to year. He was permitted to estimate on this basis its probable yearly earn-

ings from July 1913, to June 30, 1918 and to explain how his figures were arrived at."

The Court held,

"The fact that this amount of the plaintiff's damages could not be expressed in exact figures did not make them speculative. There was no speculation as to the fact of actual damage. Its business had been seriously curtailed. The defendants had caused the damage, and cannot be permitted to escape liability because it is difficult for the plaintiff to express in terms of dollars the damages it has suffered. This evidence, while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject-matter admitted. It had to do with what was never actually earned because of the deferdants' wrongdoing. The witness testified from his knowledge of the business history, made his calculations upon what appears to be a reasonable basis, and the defendants had ample opportunity by cross-examination or the offer of their own evidence on the subject to discredit him and show any fallacy in his reasoning or testimony. Whatever may be said of its weight, and that was entirely for the jury, we have no difficulty with its admissibility." Id.

Similarly, in Agrashell, Inc. v. Hammons Products Company, 479 F. 2d 269, 283 (8th Cir. 1973), the plaintiff's damages depended upon the expert testimony and projections of a Dr. Kuhlman. Despite numerous and extensive (2-1/2 pages) criticisms by the Court of the methodology employed and assumptions made by Dr. Kuhlman, not the least of which related to the appropriateness of the market utilized, the Court nonetheless, "tempered ... by the Supreme Court's statements relating to the proper function of an appellate court when reviewing damage evidence" held that:

"With these principles in mind we cannot say that as a matter of law, Dr. Kuhlman's theory failed to demonstrate the fact or quantum of damage with sufficient clarity." In Lehrman v. Gulf Oil Corp., 500 F. 2d 659 (5th Cir. 1974), proof of damages for gasoline price fixing consisted of testimony by plaintiff's expert accountant. The expert made estimates of lost future profits based on assumptions regarding the volume or gasoline sold, margin and station expense, many of which were questionable. For example, the expert projected profits based on sales of 20 and 30 thousand gallons a month when the plaintiff's highest historical sales were 15,000 gallons a month. In addition, although the expert correlated expense data with other stations, no attempt was made to correlate volume, margin or profits from other stations and, moreover, the stations with which expenses were correlated were questioned as not being comparable. Regardless of these deficiencies, the Court stated:

"...Just because Lehrman's method of proof is specially tailored to fit his case, however, does not render it unacceptable. Indeed, this court has recognized that the task of proving sales never made as a means of calculating damages is a difficult one. This, while the damages may not be determined by mere speculation or quess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference although the result be only approximate. The proof may be indirect and it may include estimates based on assumptions, so long as the assumptions rest on adequate data. Lehrman's expert's estimates of lost future profits were based on assumptions regarding volume of gasoline sold, margin and station expense. These assumptions were unquestionably open to challenge and Gulf did challenge them before the jury. Evidentiary support for the assumptions also exists, and we perceive the resolution of the conflicting claims, as the traditional responsibility of the jury... Rather than characterize Lehrman's evidence as 'rank speculation and utter guesswork' we believe it presents a just, and reasonable estimate of damages under difficult circumstances based on relevant data... the expert on damages need not be armed on the right hand with a slide rule, on the left with a computer. He is allowed some economic imagination so long as it does not become fantasy." Lehrman v. Gulf Oil Corporation, supra, at 668, 671. (Footnotes and citations omitted). [Emphasis Added].

Finally, in Atlas Building Prod. v. Diamond Block & Gravel Co., 269 F. 2d 950 (10th Cir. 1959), the plaintiff established its damages primarily on the basis of the testimony of one of the company's principals (who produced production and sales records and testified about sales policy) and by an analysis by a public accountant who projected the anticipated business or sales of the plaintiff and computed its lost profits therefrom. Significantly absent in Atlas was a consideration of the performance of the plaintiff's market. The Court stated that:

"... The accounting procedures employed by the [plaintiffl to show damages were not as satisfactory as the trial court thought they should have been, but they were sufficient... The ... [defendant] also challenges the testimony of the accountant and the manufacturing agent [the latter relating to the ability of the plaintiff to expand] as wholly outside the scope of the case and the knowledge of the witness, and as based upon hypothetical facts having no basis in the evidence and contrary thereto. Much of the accountant's testimony was of doubtful relevance, and the court, excluded parts and confined other parts within narrow range. We think in the last analysis the weight and probative value of the testimony they gave concerning the amount of damages was for the jury under instructions of the court... We have recently restated the general rule on a motion for directed verdict upon the ground of the insufficiency of the evidence to take the case to the jury on the crucial issue or issues of fact, the evidence and the inferences fairly to be drawn from the evidence must be considered in the light most favorable to the party against whom the motion is directed. And if the evidence and the inferences fairly drawn therefrom--viewed in that manner--are such that reasonable minded persons in the exercise of fair and impartial judgment may reach different conclusions upon the crucial issue or issues of fact the motion should be denied and the question submitted to the jury." Atlas Building Prod. Co. v. Diamond Block & Gravel Co., supra, at 958-959.

In connection with the above-cited cases, the testimony of Mr. POWRIE is certainly equivalent to that of the treasurer

in <u>Rankin</u> and in <u>Rankin</u>, the benefit of the expertise of Drs.

BRUNER and MOSICH was absent. The methodology and assumptions made in the projections of Drs. BRUNER and MOSICH were far superior to those utilized in either <u>Agrashell</u> or <u>Lehrman</u>.

Finally, in <u>Atlas</u>, damages were predicated merely upon the testimony of a principal of the plaintiff and an accountant without a consideration of market performance. Again, the expertise of Dr. BRUNER and the utilization of SIC 2591 to measure market performance in the instant case were superior probative evidence.

As indicated, the projection of TEXTURA'S sales and the projection of net profits predicated thereon were the products of credible evidence, reasonable assumptions and the experience and knowledge of two eminently qualified, independent experts who were subjected to rigorous cross-examination. Because of the indefiniteness inherent in projecting the sales and profits of a business which has been forced to cease operations, projections utilized in computing damages are competent even though they are estimates if the assumptions have an adequate basis. The fact that minor imperfections are present in the methodology or that alternative methodologies exist, does not render a given projection unreasonable. Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., 471 F. 2d 894 (5th Cir. 1973); Locklin v. Day Glo Color Corporation, 429 F. 2d 873 (7th Cir. 1970); Lehrman v. Gulf Oil Corp., supra; Greene v. General Foods Corp., supra; Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc., 383 F. 2d 97 (5th Cir. 1967); Terrel v. Household Goods Carriers' Bureau, supra. It is submitted that notwithstanding the contentions of the Defendants, the sales projection and the profit projection were competent and constituted sufficient evidence upon which the jury could determine the amount of damages suffered by TEXTURA as a result of being forced out of business by the Defendants' antitrust violation.

B. APART FROM THE SALES AND PROFIT PROJECTIONS OF DRS. BRUNER AND MOSICH, THERE WAS SUFFICIENT EVIDENCE OF DAMAGE.

Other evidence of damage, apart from the sales and profit projections, was introduced at trial which provided a sufficient basis from which the jury could have awarded damages in the amount of \$531,017. This additional evidence may be separated into three categories: (1) evidence of gross and net profits of TEXTURA, (2) evidence of anticipated revenues of TEXTURA, and (3) the net income projections of ALLEN FRIEDMAN.

(1) EVIDENCE OF GROSS AND NET PROFITS.

Apart from the sales and profit projections of Drs.

BRUNER and MOSICH the following evidence was introduced at trial which related to the gross and net profits of TEXTURA:

(a) The complete financial statements of TEXTURA and its predecessors for the period from 1958
through June, 1966 [PX 810-813, 13, 15, 20, 36, 47;
App.];

(b) The sales analyses of TEXTURA for the years 1962 through 1966 [PX 879-881, 858, 864; App.

1;

(c) The testimony of Mr. ZIMMERMAN, a partner in the accounting firm which serviced TEXTURA and the individual who prepared TEXTURA'S financial statements until March, 1966 [Tr. 1029-1114; App.

].

Based on the foregoing evidence, the jury was capable of determining the amount of net profits TEXTURA would have realized had it not been forced to terminate its operations, independent of the testimony and projections of Drs. BRUJER and MOSICH.

The annual sales analyses generally indicated that TEX-TURA'S gross sales were increasing. The financial statements indicate that profits in 1962 and 1963 were in excess of \$40,000 and pre-fumably would have been comparable in 1964 and 1965 but for the costs incurred in connection with the expansion of TEXTURA into a national market. (See discussion in the Statement Of Facts under "The Parties - TEXTURA and the history of its business", supra). TEXTURA'S income statement for the first six months of 1966 [PX 47; App.] shows net profits of greater than \$60,000 for that period. Utilizing this evidence, the jury could have reasonably concluded that TEXTURA'S sales would continue to increase and that profits in subsequent years would be in excess of \$40,000 which was less than one-half of the net profits in the first six months of 1966. Accordingly, if the jury determined that TEXTURA would continue in business

for at least ten (10) years, the award of \$531,617 was very conservative.

Although the jury had sufficient evidence without reference to the 1966 income statement [PX 47; App.] to award such damages to TEXTURA, it was permissable for the jury to also rely on that statement notwithstanding that it was an untyped pencil draft which was neither certified nor audited. Dr. MOSICH testified that the 1966 statement was prepared in accordance with generally accepted accounting principles. [Tr. 1287-1288; App.]. Mr. ZIM-MERMAN testified that interim statements are not customarily audited or certified [Tr. 1034; App.] and described the careful procedure involved in preparing such statements for TEXTURA [Tr. 1082-1084; App.]. Mr. ZIMMERMAN justified each significant entry in the statement and stated why the "Del Webb job" was eliminated from the same [Tr. 1083; App.]. In addition, the 1966 income statement was prepared by Mr. BERMAN (deceased at time of trial) [Tr. 1042; App.], a certified public accountant and a partner of Mr. ZIMMERMAN, in an accounting firm which had expertise with respect to textile clients [Tr. 1031, 1042; App. Accordingly, the 1966 income statement was competent as well as reliable.

The cases cited by Defendants do not undermine this conclusion. In <u>Knutson</u> v. <u>Daily Review, Inc.</u>, 383 F. Supp. 1346 (N. D. Cal. 1974) the Court would not predicate damages on an unaudited

profit and loss statement because the statement was prepared subsequent to commencement of the litigation for the purpose of establishing damages. In addition, the accountants who prepared the statement (one of more than one "set") knew the purpose for which the statement would be utilized. Moreover, the profit data contained in the statement was not credible and was based solely on unverified representations and estimates and whatever documents were produced by the plaintiff. In contrast, the 1966 income statement of TEXTURA was prepared prior to litigation by an independent certified public accountant, was credible and was not solely based on unverified representations and estimates produced by TEXTURA [Tr. 1082-1084; App.].

Defendants further contend that the 1966 income statement of TEXTURA should not have been considered by the jury in determining damages because it did not reflect a representative period in TEXTURA'S history. As indicated, <u>supra</u>, because TEXTURA was in the process of expanding its operations, no truly representative period from which profits could be projected existed. Indeed, this was the reason reliance on SIC 2591 was made in connection with the sales projections of Dr. BRUNER. Moreover, in view of the profits of TEXTURA in 1962 and 1963 and the increase in sales in the years thereafter, the first six months of 1966 was not an unrepresentative period in TEXTURA'S history. Accordingly, not only could the jury have relied on the 1966 income statement alone to determine damages, but in conjunction with the other evidence, <u>supra</u>, utilization of the statement was clearly permissable.

(2) EVIDENCE OF ANTICIPATED REVENUES.

In addition to the sales and profit projections and the evidence of gross and net profits, TEXTURA also introduced the following evidence upon which the jury could have relied in assessing damages:

- (a) Unfilled purchase orders or invoices of TEXTURA in 1966 [PX 843, 844; App.];
- (b) Unfinished contracts of TEXTURA in 1966 [PX 586, 587, 591, 845, 846, 848; App. 1:
- (c) Potential contracts or "working" jobs of TEXTURA in 1966 [PX 254, 555; App.];
- (d) Job status reports of TEXTURA in 1966 [PX 851, 854, 628; App.]; and
- (e) The testimony of ALLEN FRIEDMAN, infra, in connection therewith.

Based on this evidence, it is clear that at the time it was forced out of business, TEXTURA had generated or was in the process of generating revenues in an amount in excess of \$480,000 as follows:

Approximate amount of unfille purchase orders		
Approximate amount of unfinis		
Approximate amount of potents contracts		
TOTA	AL \$497,500	

In addition, the job status reports indicate that at the time it was forced out of business, TEXTURA was in the process of obtaining, or had obtained contracts from which revenues in excess of \$2,500,000 could have been reasonably anticipated. In connection with the "specified" or "working" jobs referred to in the status reports which included those on which bids had been made by TEXTURA, Mr. FRIEDMAN, infra, testified [Tr. 1795; App.]:

"That [the potential contracts] of course is prognostication because they [the potential contracts] weren't in hand. But historically we had gotten a very large percentage of those contracts that we bid on..."

and Mr. POWRIE stated that on every occasion on thich TEXTURA prepared drapery specifications which were incorporated in the bid specifications distributed to potential or actual bidders (those jobs indicated as being "specified" in the job status reports)

TEXTURA was awarded the contract [Tr. 554-561; App.]. In addition, JOHNSTONE of TEXTURA'S San Francisco office, testified [Tr. 1876-1879; App.] that TEXTURA lost numerous jobs as a result of the inability to obtain the Defendants' fabric and PX-254 (App.) states in part:

"Item 2: First America Building - San Jose

First contact Sept. 16, 1966. Contract taken Oct. 27, 1967 (copy enclosed). Fabric Linweave Desert Sand. Total amount \$35,000. This contract was taken by Johnstone-Ferrall Inc. only after Textura was unable to supply the fabric.

Clark-Schwebel Inc. would not deal directly, due to its problem with Textura; we [Johnstone-Ferrall Inc.] obtained their

contract by assigning it at a cost of the gross profit to Consolidated Textiles who in turn could deal with Clark-Schwebel.

* * * * * * * * *

...However, as we both know, there were amny [sic] specified jcb quotations and every day contract business that were in the year of 1967 of 10 to 15 thousand dollars in sales. I might add in closing, that due to the fact that Textura Limited could no longer supply Johnstone-Ferrall Inc. there were many jobs that were lost due to our inability to supply the specified fabric and in fact quotations made in behalf of Textura Limited."

Thus, the jury could have predicated its award of damages solely on the evidence adduced with respect to TEXTURA'S anticipated revenues.

(3) NET INCOME PROJECTIONS OF ALLEN FRIEDMAN.

Finally, the jury could have determined the amount of TEXTURA'S damages on the basis of ALLEN FRIEDMAN'S net income projections for TEXTURA for 1966 and his testimony in conjunction therewith
[PX 48; App.], [Tr. 1778-1820; App.]. Mr. FRIEDMAN was
the general manager of TEXTURA in 1965 [Tr. 1779; App.]. In
connection with preparing TEXTURA'S 1966 budget, Mr. FRIEDMAN made
sales, costs and profit or net income projections on the basis of
TEXTURA'S contracts on hand and jobs on which TEXTURA was bidding*:

"A. To project the sales I had essentially two sources. One, I had the contracts on hand, which were not complete at the time, but which were in the house and could serve as a predictable measure of sales volume.

Two, I had those jobs which we were in the process of bidding, where we had a dollar volume figure and where our chance of getting

^{*}The projections were prepared in 1965, prior to the time when the instant case was filed or even contemplated, and, accordingly, the projections were not made for purposes of this litigation.

that contract was something I would have discussed with Mr. Powrie or Mr. Alonzo, or whoever else might have been involved in the particular contract.

That, of course, is prognostication because they weren't in hand. But historically we had gotten a very large percentage of those contracts that we bid on.

And with those, of course, we had the anticipated cost of fabric, we knew the cost of operating, and from what we had come up with an end result." [Tr. 1795-1796]

The projections estimated that the monthly operating net profits of TEXTURA in 1966 would have been \$5,740 based on monthly sales of \$100,000*. Assuming that TEXTURA'S sales for each six month period between 1967 and 1976 did not exceed \$600,000 (a conservative estimate since TEXTURA in fact had sales of greater than \$800,000 in the first six months of 1966 [PX 864; App.], the jury could reasonably have concluded that net profits for each of the years 1967 through 1976 would have been at least \$50,000 based on the income projections of Mr. FRIEDMAN alone. Accordingly, apart from the sales and profit projections and the evidence relating to gross and net profits, supra, there was sufficient evidence with respect to revenues of TEXTURA upon which the jury could have assessed damages.

As indicated, even without the benefit of the projections of Drs. BRUNER and MOSICH, the evidence with respect to profits, revenues and the FRIEDMAN income projections, and the testimony in connection therewith, provided an adequate basis for computing damages.

"Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of damages can not be esti-

^{*}Mr. FRIEDMAN also projected 1966 monthly net profits of \$11,808, \$14,248, \$17,908, \$24,008 and \$30,108, respectively, if monthly sales were \$125,000, \$135,000, \$150,000, \$175,000 and \$200,000.

mated with certainty, or only as part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit." Story Parchment Co. v. Patterson P. Co., 282 U.S. 555, at 563 (1931).

* * * * * * * * * * * * *

"Had there been no evidence from which damages could be fixed by the jury, of course this plaintiff could not recover. But there was evidence. The financial history of the Ramsay business was in the case. Perhaps the jury was not as competent to analyze that evidence as some financial and business expert might have been, but it could draw its own reasonable conclusions from it. That is what a jury is to do anyway in arriving at the amount of damages in any case. The jury had the data before it and was left to determine the damages from that in what may be called its raw state. Perhaps the testimony of some one competent to have estimated the business loss resulting from the defendants' acts would have helped, but it was not indispensable." William H. Rankin Co. v. Associated Bill Posters of U. S., supra, at 156.

See also <u>Flintkote Company</u> v. <u>Lysfjord</u>, <u>supra</u> and <u>Ford Motor Co.</u> v. Websters Auto Sales, Inc., 361 F. 2d 874 (1st Cir. 1966).

The additional evidence introduced by TEXTURA, <u>supra</u>, was sufficient unto itself to provide a reasonable basis for the determination of damages by the jury. When viewed in conjunction with the sales and profit projections of Dr. BRUNER and Dr. MOSICH, it is submitted that TEXTURA'S proof of damages was more than adequate to support the jury verdict under the following authorities:

"It must nevertheless be kept in mind that a treble damage plaintiff seeking recovery for market exclusion cannot provide detailed, concrete, and precise proof... The fact finder may act on probability and inference. Any other rule would only induce the wrongdoer to inflict more greivous injury, thus immunizing himself from liability by causing the amount of damages to be uncertain. The law has not set down any mechanical test or formula as regards the required proof, lest the rigid statement of rule provide the very means to escape its sanction. Rather the

courts have been liberal in designing rules of proof with respect to the amount of damages when the fact of damages, as here, is clearly established. Even though we may not agree with each step in the masters reasoning process, we must affirm, unless the findings are beyond the pale of same judgment. A finding is not clearly erroneous unless the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed... That there are conflicts in the evidence and wide room for argument shows only that permissible conclusions were drawn. A choice between two permissible views of the weight of the evidence is not clearly erroneous." Locklin v. Day-Glo Color Corporation, 429 F. 2d 873, 879, 880 (7th Cir. 1970) [Citations Omitted] [Emphasis Supplied].

* * * * * * * * * * * *

"...while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. Eastman Kodak Co. v. Southern Photo Materials Co. 273 U.S. 359, 379, 71 L. Ed. 684, 691, 47 S. Ct. 400 ... Juries are allowed to act upon probable and inferential, as well as direct and positive proof... the constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of a certainment is no longer confused with right of recovery." Story Parchment Co. v. Patterson P. Co., 282 U.S. 555, 563, 564, 566 (1931) [Citations omitted]. See also, Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946).

* * * * * * * * * * * * *

"An appellate court should not substitute its own judgment unless there is a complete ab ence of substantial probative facts to support the jury's verdict... there are practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market since damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts... Therefore, the amount of damages need not depend on precise proof but can be based on assumptions if the assumptions rest on an adequate base... The fact finders may act on probability and inference... The jury's findings as to damages must be affirmed unless the findings are beyond the pale of same judgment. Furthermore, once the fact of damage is proven the actual computation of damages may suffer from minor imperfections... Sometimes proof of losses which border on the speculative must be resorted to in order to implement the policy of the antitrust laws... Assumptions as to damages are permissible when future profits must be determined due to the self-evident intangible nature of the subject matter." Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., 471 F. 2d 894, 902-904 (5th Cir. 1973) [Citations Omitted].

* * * * * * * * * * * * *

"If proven facts do give support to the inference necessary to sustain a plaintiff's case, then, under the rule of Lavender]v. Kurn, 327 U.S. 645 (1946)], it is immaterial that they give equal support to a contrary inference. It is only when there is a complete absence of probative facts to support the conclusion reached that the jury's judgment may be ignored."

Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc., 383 F. 2d 97, 103. (5th Cir. 1967) [Citations Omitted].

See also, William Goldman Theatres v. Loews Inc., 69 F. Supp. 103, 109 E. D. Pa. 1946); Terrel v. Household Goods Carriers Bureau, supra; Twentieth Century Fox F. Corp. v. Brookside Theatre Corp., 194 F. 2d 846 (8th Cir. 1952).

As set forth above, the jury award was predicated on credible and substantial evidence and accordingly was not speculative. At the very least, the damages determined by the jury were not beyond the "pale of sane judgment" nor was there a "complete absence of probative facts to support" it. The damages awarded by the jury should therefore be affirmed.

POINT IV

CHI CHAPGES TO THE JURY DID NOT CONTAIN ANY PRE-JUDICIAL ERROR

Defendants' contention that the charges to the jury contain "four fundamental errors" requiring "a new trial", [p. 36 CLARK-SCHWEBEL'S Brief] is without merit. Before discussing the specific instructions challenged by Defendants, it is pertinent to note that jury instructions must be read as a whole and minor defects will not impugn the charge so long as the overall charge can be viewed as properly setting forth the applicable law.

"Trial judges must be allowed some leeway, and absolute clarity is hardly to be always expected. True, a single ruling can vitiate an entire charge if it is on a vital issue and is misleading...[b]ut here the areas of ambiguity which plaintiff stresses were made sufficiently clear by the charge as a whole to assure him a fair consideration of all his theories. 'A charge must be interpreted as a whole, *** not in individual parts." [Citations omitted] Franks v. United States Lines Co., 324 F. 2d 126 (2d Cir. 1963).

"A jury charge is comprehensive and ought not to be read in fragments. Our scrutiny of the District Court's instructions must be orbitary and universal, not narrow and monocular. In the present instance the charge of the trial court, when viewed in its full context, fairly presented the law to the jury and is not rightfully subject to impugnment. [Citations omitted] "McDaniel v. Slade, 404 F. 2d 607 (5th Cir. 1968).

A. "One or Two Conspiracies"

Defendants' contention that the jury was confused

with respect to whether Plaintiffs were charging one or two conspiracies is baseless.

At the opening of his charges on the particular claims, the Court instructed the jury as follows:

"As you know, Textura and Mr. Powrie, the Plaintiffs, are seeking to recover money damages for injuries to business and property they allegedly sustained as a direct and proximate result of two alleged conspiracies to restrain trade under the Federal antitrust laws. (Emphasis Added) [Tr. 2332; App.]

At a point immediately preceding the charges which BURLINGTON and CLARK-SCHWEBEL complain of, the Court stated:

"Plaint...s have charged that there were two conspiracies — one to fix prices in industrial fiber glass fabrics and one to put Textura out of business. Defendants have admitted that prices were fixed on industrial fabrics at one time. Although they have admitted that they were parties to the price-fixing conspiracy, however, you may not infer from that admission that defendants conspired to drive Textura out of business." [Tr. 2345; App.].

Plainly the references to "the conspiracy" which occur immediately after the above instruction [Tr. 2346-2351; App.] and the charge objected to [Tr. 2349; App.], are to be considered with reference to it.* McDaniel v. Slade, stpra.

Any lapse in the charge on this subject furthermore was immediately corrected in the jury's mind by the special interroga-

^{*}Contrary to the assertion in CLARK-SCHWEREL'S Brief there is nowhere on page Tr. 2349 a reference to "one conspiracy". [App.] Also, the references to "this conspiracy" which occur on pages 2350 and 2351 of the transcript refer only to the conspiracy to drive TEXTURA out of business. [App.]

tories submitted by the Court to the jury pursuant to Rule 49, F.P.C.P. As Appendix A indicates, these interrogatories totally separated the two conspiracies in submitting them to the jury, as indicated in the following headings:

"A. CONSPIRING TO DRIVE PLAINTIFFS OUT OF BUSINESS"

* * * * * * * * * * * * *

"B. CONSPIRING TO FIX PRICES ON INDUSTRIAL FIBERGLASS FABRICS".

Finally, as previously noted, the jury manifested its lack of confusion with respect to the two conspiracies by finding that STEVENS participated in the industrial price-fixing conspiracy but not the conspiracy to drive TEXTURA out of business.

B. "The Co-Conspirators".

Any potential harm done by this charge was immediately corrected in the form of the special verdict [App.] submitted to the jury, Appendix A hereto. Question A-1 permitted the jury to find only a conspiracy between two or more persons* or corporations effected only by the means listed. Appendix A, Question A-1. These listed "means" did not include any of the matters alleged pertaining to the co-conspirators. Specifically, neither the Court's charge that Plaintiffs claimed that,

"Defendants and the alleged co-conspirators Dommerich or Moscowitz conspired to circulate false information..."
[Tr. 2350; App.]

^{*}Certain officers of the P endants had been named as co-conspirators.

nor its charge that Plaintiffs claimed that,

"all three defendants and Dommerich conspired to induce Dommerich to withhold moneys and to cancel its factoring contract with TEXTURA" [Tr. 2350; App.]

were listed in Question A-1 as possible "means" utilized by persons or corporations participating in the conspiracy. Accordingly, the question of the co-conspirators was never presented to the jury.

Furthermore, the jury answered Question A-2 by finding that BURLINGTON and CLARK-SCHWEBEL conspired. Appendix A, Question A-2. Taken together with Question A-1, the only conclusion that could be drawn is that the jury found that these two Defendants conspired only with each other. A request submitted by the jury during its deliberations confirms this.*

C. "Conscious Parallelism" and "Exchange of Information". **

With respect to both sides' requested charges, the Court stated:

"As to the requests, most requests will be granted directly or in substance. Those requests which I do not feel appropriate will not go to the jury. There is a great deal of factual discussion, and I have tried to tailor it to

^{*&}quot;Company X is telephoned by Company Y and tells Company X he (Company Y) is holding up credit on Customer A company. Y also tells Company X that Company Z is holding up credit on Customer A. And actions followed that two cut of the three companies at the same time period modified their credit arrangement. Is this a conspiracy?"
[Tr. 2408; App.] [Emphasis Added]. This question tracks PX 146, a memorandum of SCHWEBEL'S (CIARK-SCHWEBEL - "Company Y") phone call to JANETSCHEK (STEVENS - "Company X") advising him that both he and KELLY (BURLINGTON - "Company Z") were not processing orders for TEXTURA ("Company A"). [App.].

^{**}Defendants' arguments that the charges to the jury regarding conscious parrallelism and exchange of information were erroneous, suffer from the same defects as their contention that there was insufficient evidence to support the jury's finding of conspiracy, which is discussed in detail at POINT I, supra.

matters of law, rather than a discussion of the evidence. I am not going to marshal the evidence in this case." [Emphasis Added]. [Tr. 2161; App.].

A comparison of Defendants' requests with the Court's charges disclose that the Court gave Defendants' requested charges in substance, to the extent they accurately reflected the law.

The Court's charge as quoted in Appendix B to the CLARK-SCHWEBEL Brief omits the Judge's opening remarks to the jury on the issue of conspiracy [Tr. 2340-2342; App.] and also omits the following charges given by the Court on these issues:

"Now, in support of its claim that defendants' motives were anti-competitive, plaintiff also claims that the actions which defendants took were contrary [to] defendants' own self-interests. If you find by a preponderance of the credible evidence that defendants acted in apparent contradiction of their own self-interest, you may, but need not necessarily, infer that there was a conspiracy." [Tr. 2345; App.].

* * * * * * * * * * * * *

"...a business may, for good reasons or bad reasons, withdraw extended credit privileges, stop deliveries or sell defective goods, so long as its decision to do so is based upon its independent judgment. ..." [Tr. 2351; App.].

The charge as a whole conveys the substance of Defendants' requests.

The Court's charge on exchange of information similarly gave Defendants' request on that subject in substance. Appendix B, CLARK-SCHWEBEL'S Brief. CLARK-SCHWEBEL also omits to state that

the Court charged, in addition to the charges set forth in their Appendix B, that "the exchange of information among sellers regarding a common customer is not prohibited by Section [sic] of the Sherman Antitrust Act if the exchange is the result of independent judgment and not the result of a conspiracy" [Tr. 2351; App.].

Defendants' requests sought to have the Court charge that no inference of conspiracy may be drawn from similar conduct if said conduct is "consistent with each alleged conspirator having acted independently". CLARK-SCHWEBEL'S Brief Appendix B. They also sought to have the Court charge that if a Defendant restricted TEXTURA'S credit when it had reason to be concerned about TEXTURA'S ability to pay such action would not be contrary to said Defendants' self-interest. Id. Taking the latter request first, it grossly oversimplifies the issues in the case. Plaintiffs conceded from the start that the Defendants "to d reason to be concerned" about TEXTURA'S ability to pay. They proved, however, that these same suppliers had provided TEXTURA with extraordinarily liberal credit terms over many of the years during which their concern based on TEXTURA'S financial results, should have been greatest. The question posed to the jury was: what inference was to be drawn, together with and in the light of other evidence, from BURLINGTON and CLARK-SCHWEBEL'S reversal of this policy in 1966 when it appeared that TEXTURA was doing better than it ever had done. Taken together with other proof, Plaintiffs contended that a conspiracy was made out. Defendants' requested charge was a crude attempt to foreclose jury consideration of this fundamental issue.

Both requests are defective in that they seek to substitute a conclusive presumption for jury decision. Under the theory of their requests, if a defendant offered evidence supporting a theory which explained similar conduct on the basis of independent action, the jury could not have concluded otherwise. This is not the law. It is for the jury to take such evidence and weigh it against Plaintiffs' evidence supporting the theory of anticompetitive behavior and decide which inference is the more reasonable. See cases cited and discussed Point I, supra. The Court's charge thus correctly placed those issues before the jury.

Plaintiffs have never contended that they relied solely on the doctrine of conscious parallelism. (See discussion, Point I supra). This being so, the Court's charge that identical action need not be shown to establish conspiracy [Tr. 2343; App.] was not a "misleading generality" as Defendants contend (p. 39, CLARK-SCHWEBEL'S Brief) but was the only fair charge that could have been given under the circumstances.

An issue in this case was whether or not the communications between CLARK-SCHWEBEL and BURLINGTON were routine credit exchanges or illegal invitations or suggestions to adopt pressure tactics against TEXTURA. There was ample evidence from which the jury could have found that these communications were not made as a routine exchange of credit information, but were vehicles for conspiratorial suggestion and invitation. See discussion Point I, supra. Defendants requested charge concerning "exchange of in-

formation" however, sought to remove from the jury any consideration of the communications between BURLINGTON and CLARK-SCHWEBEL upon a showing that credit information was exchanged. Appendix B, CLARK-SCHWEBEL'S Brief. To thus foreclose jury consideration of this important issue would have been extremely prejudicial to Plaintiffs and contrary to established law.

POINT V

THERE WERE NO PREJUDICIAL ERRORS IN THE CONDUCT OF THE TRIAL

Despite Judge Tenney's holding that Defendants' claims regarding alleged prejudicial errors at trial "do not merit serious discussion" [App.], Defendants nonetheless persist in raising these frivolous and negligible arguments for this Court's consideration.* To avoid the appearance of acquiescence by TEXTURA, these arguments will be discussed below.

A. THERE IS NO EVIDENCE OF JURY CONFUSION OF OF FAILURE TO COMPREHEND THE NATURE OF THE CONSPIRACE CHARGE.

Defendants' assertion that the length of the jury's deliberation and its well-reasoned requests for clarification of certain
complicated legal principles should serve as grounds upon which the
trial court should have ordered a mistrial is completely without
merit. Defendants argue, in essence, that the more lengthy a jury's
deliberation and the more thorough and exacting a jury attempts to
be in its evaluation of the case before it, the more suspect is the
verdict.

The record clearly establishes - contrary to Defendants' contentions - that the jury was careful, intelligent, thorough and deliberate in weighing and sifting through the tremendous volume of testimony and documents they had been presented during the four-week

^{*}See pages 41 to 50 of CLARK-SCHWEBEL'S Brief.

trial. The jurors' requests that the conspiracy charge be repeated and clarified merely emphasizes the care and responsibility with which the jury approached its task.

De indants first presented their "confusion" argument at length to Chief Judge Edelstein who, in rejecting it, stated:

"I understand your problem and I understand your argument. Yet I think it must be conceded based on your extensive experience... that your [sic] making an assumption ...

...[T] here is one thing lacking in this scenario, that at no time has this jury, even last night, when they suggested they were tired -- say to the Court, "We have debated these points; we are absolutely, irretrievably at odds; we cannot reconcile our differences; we ask that you release us because we cannot arrive at a verdict."

Now isn't that curious? You're not going to suggest, I hope, that the jury is so lacking in fundamental intelligence that they are unable to say after three days, "We cannot reach agreement." or "We are so confused that it is impossible for us to resolve the issue." [Tr. 2418; App.]

In responding specifically to the question of the length of time which the jury had deliberated, the Chief Judge remarked:

"...We do know, however, that this case has lasted approximately three weeks: we do know that the issues are quite complex; we do know that there are numerous documents involved. This presents a maze to any jury. I am not even sure that if we all sat down, the six of us [referring to the attorneys], and began to deliberate, that we would not have to wrestle with some of the problems that have arisen here." [Tr. 2419; App.]

And finally, Judge Edelstein noted the fundamental responsibility the Court has to a jury which is tirelessly endeavoring to fulfill its public responsibilities:

"This jury is brought into the jury box here; they are told

they have a public duty, and they do. They may say, "What is going on here? We have not indicated any disagreement; we have asked some questions; he has been impatient and irascible; he sends us home; he has dumped this case..." I would have to say something. I am discharging them? Why? "Because it appears from the questions you have asked that you don't understand what this is about."

Do you want me to say that to them? [Tr. 2420; App.

A review of the jury's verdict in this case confirms the wisdom of Judge Edelstein's confidence in their ability to reach a logical result. The verdict, as evidenced by the jury's answers to the Court's interrogatories [App.], was consistent in all respects with the evidence and the law which had been presented to them.* In fact, the verdict in favor of STEVENS on the main conspiracy (while finding STEVENS to have participated in the industrial price-fixing conspiracy), rather than evidencing confusion, demonstrates the jurors' clarity of mind and thoroughness in examining the record.

Defendants, themselves, had established during the cross-examination of Mr. POWRIE that STEVENS was the "least culpable" of the Defendants:

- "Q. Fine, as a matter of fact, Mr. Powrie, you have told people at Stevens that so far as the various defendants were concerned, Stevens wore the white hat, haven't you?
- A. Yes, I did.
- Q. And that's your appraisal of them, isn't that right?
- A. They were the least involved, the less innocuous, the least culpable. They weren't involved in the contract business. They caused the least damage." [Tr. 698; App.

In Fox West Coast Theatres Corp. v. Paradise Theatre Building Corp.,

^{*}This is contrary to the fact situation presented by Fenney v. Stieringer, 162 F. Supp. 540 (W.D.N.Y. 1957), the lone case cited by Defendants to support their contention regarding jury confusion, where the jury returned a verdict so internally inconsistent in its multiple findings that the Court was of the opinion that it had no other choice but than to set aside the verdict.

264 F. 2d 602 (9th Cir. 1958), an analogous case involving violations of the anti-trust laws and parallel action, the jury had returned a "mixed verdict", finding certain alleged conspirators guilty and others not guilty. Responding on appeal to the remaining defendants' claim that this constituted "inconsistency in the verdict", the Ninth Circuit wrote:

"Once it is found that there was substantial evidence that [those defendants found guilty] combined unlawfully to discriminate against [Plaintiff], then evidence of action by others tending to produce the unlawful result may be corroborative of the charge, even though these others may not be found eventually to have been conspirators ... The jury had a right and the duty to consider the record as a whole and determine who, if any, were participants in an unlawful combination." 264 F. 2d at 605.

Finally, absent manifest abuse of discretion, which is not present here, it is not a concern of this Court how long the jury deliberated or how many questions the jury asked prior to rendering its verdict. It is up to the trial Judge to determine, in his discretion, at what point a jury should be dismissed for inability to reach a verdict. See McDougle v. Woodward & Lothrop, Inc., 312 F. 2d 21, 24 (4th Cir. 1963); Chapman v. Brown, 198 F. Supp. 78, 98 (D. Hawaii 1961), aff'd 304 F. 2d 149 (9th Cir. 1962). See also, Marx v. Hartford Accident and Indemnity Co., 321 F. 2d 70 (5th Cir. 1963). And certainly it is well settled that no Court is entitled to challenge the thought processes by which a jury reaches its verdict, absent the most persuasive showing by competent evidence that jury misconduct has occurred. See e.g. Dunn v. United States, 284 U.S. 390, 406-07 (1932); Maher v. Isthmian Steamship Company, 253 F. 2d 414

(2nd Cir. 1958). See generally, 6A Mcore's Federal Practice ¶59.08[4]. Clearly no such showing has or can be made by Defendants in this case. Consequently there are no grounds to support Defendants' argument that a mistrial should have been granted on grounds of "jury confusion".

B. DEFENDANTS' CLAIM OF PREJUDICE ARISING FROM PLAINTIFFS' EFFORTS TO PROVE DECORATIVE AND INDUSTRIAL PRICE-FIXING IS BASELESS.

Defendants' contention that they were substantially prejudiced at trial rests primarily on their assertion that the verdict
of the jury "was brought about by the prejudice engendered by continual
references to industrial price-fixing" [p. 41, CLARK-SCHWEBEL'S
Brief]*. This contention overlooks the fact that (1) the original
Complaint charges price-fixing with respect to decorative fabrics,
(2) Plaintiffs purchased an enormous amount of decorative fabrics
from Defendants, creating a potentially huge damage claim in connec-

^{*}Defendants' allegations of attempted prejudice by Plaintiffs are merely an attempt to cover up their efforts to prejudice the jury against POWRIE, Plaintiffs' chief witness, by the assertion of virtually identical counterclaims charging fraud on POWRIE'S part. These counterclaims were asserted four years after the Complaint was filed and after Defendants had filed proofs of claim in the bankruptcy proceedings for the same amounts sought by their counterclaims (except for punitive damages). In view of CLARK-SCHWEBEL'S Answers To Interrogatories dated April 6, 1971 [App.], containing extensive charges of fraud on creditors and income tax evsion by POWRIE and all Defendants' Joint Answers To Interrogatories dated June 13, 1972 [App.] asserting Defendants would produce an expert witness at trial to testify inter alia that the financial statements (Defendants' allegedly relied upon) prepared by POWRIE were false and misleading, Plaintiffs' unsuccessfully moved the Court below for an order granting a separate trial of the counterclaims to avoid prejudice to the Plaintiffs. At trial, Defendants did their best to use the counterclaims to prejudice the jury but never produced their expert witness and indeed never even attempted to show reliance upon the allegedly fraudulent financial statements.

tion with decorative price-fixing, and (3) these very same Defendants sold industrial fabrics to Plaintiffs and others on which they fixed the price and Plaintiffs were entitled to attempt to prove their damages in connection therewith.

What Defendants' characterize as the "totally irrelevant but inflamatory issue of industrial price-fixing" [p. 41 CLARK-SCHWEBEL'S Brief] was, quite to the contrary, neither irrelevant nor inflamatory. As Defendants point out, they concede their involvement in the industrial fiberglass fabric price-fixing which was the subject of the United States Department of Justice investigation in 1963 and 1964. Plaintiffs, however, based upon conversations with RAY CLARK*, had substantial reason to believe that decorative fiberglass fabric prices were also fixed during the same time period. It was reasonable therefore for Plaintiffs to believe, and attempt to establish, that when the Defendants admittedly got together and fixed prices on the industrial fiberglass fabrics they sold, they also fixed prices on the decorative fiberglass fabrics they sold. As this Court has noted, where "one has violated the Sherman Act in one situation, it might be expected that the same parties would be willing and able to do so elsewhere". Dipson Theatres v. Buffalo Theatres, 190 F. 2d 951, 958 (2d Cir. 1951) cert. denied 342 U. S. 926 (1952); Milgram v. Loew's Inc., 192 F. 2d 579, 584 (3rd Cir. 1951) cert. denied 343 U. S. 929 (1952). In Milgram plaintiff alleged that defendants had conspired to refuse to license first-run feature motion pictures to plaintiff's drive-in. The defendants had

^{*}Conversations in which Mr. CLARK admitted having been involved in the fixing of decorative as well as industrial fiberglass fabric prices. Evidence of these conversations was excluded by the Court, at least in part based upon the Deadman's Statute [Tr. 482 et seq.; App.].

previously been convicted of anti-trust violations. The Court in commenting on the evidentiary value of defendants' past misconduct wrote:

"We think that the past proclivity of these defendants to unlawful conduct may be of some significance here, where the conspiracy alleged by plaintiff is identical in scope and nature to one of the conspiracies found in the [prior] case." [Emphasis Added].

The Court reached this conclusion <u>despite the fact</u> that the claim then before it arose out of facts occurring subsequent to the time period considered in the prior case. In the instant case, the alleged decorative price-fixing was believed to have occurred simultaneously and as part of the admitted industrial price-fixing Consequently, the probative value of Defendants' confessed industrial price-fixing is all the more relevant under the <u>Milgram</u> analysis.

It is precisely on this hasis that the cases cited by Defendants (p. 43, CLARK-SCHWEBEL'S Brief) in support of their allegations regarding the prejudicial effect of Plaintiff's reported references to industrial price-fixing are distinguishable from the present case. In those cases plaintiffs were attempting to use defendants' prior convictions of wrongdoing to establish subsequent conspirations. See e.g. Dart Drug Corporation v. Parke, Davis & Company, 344 F. 2d 173, 184 (D.C. Cir. 1965) and International Shoe Machine Corp. v. United Shoe Machine Corp., 315 F. 2d 449, 455 et seq. (1st Cir. 1963).

In our case, however, Plaintiffs were attempting to show that contemporaneous with and as a part of Defendants' industrial price-fixing conspiracy there also existed a conspiracy among these same Defendants to fix the prices of decorative fiberglass tabrica.

Plaintiffs' belief that Defendants fixed the prices of decorative fiberglass fabrics while they were engaged in industrial fiberglass fabrics price-fixing was understandbly strengthened by Defendants' vehement opposition to Plaintiffs' numerous requests for the production of Grand Jury testimony* relating to the industrial price-fixing. Although Plaintiffs were willing to concede that the Grand Jury testimony might once and for all eliminate the claim of decorative price-fixing from the case, Defendants nonetheless persisted in their objection. Plaintiffs were, therefore, being reasonable when, regardless of Defendants' "confession" as to industrial price-fixing they questioned each of the so-called price-fixing witnesses as to whether their industrial fabrics price-fixing activities extended to decorative fabrics.

Two points remain to be discussed. First, prior to trial, Judges RYAN, CONNER and TENNEY had occasion to pass upon and reject Defendants' contention that the inclusion of Plaintiffs' claim in this action that Plaintiffs suffered damages as a result of Defendants' fixing the prices of industrial fiberglass fabrics sold to

^{*}Of witnesses, whose memories during their depositions were vague and poor but who did recollect that their memories were better when they gave their prior Grand Jury testimony.

Plaintiffs unduly prejudiced Defendants. Defendants have come up with nothing new to challenge the validity of the decisions of the Judges who have previously ruled on this issue. The validity of these decisions and the fact that the allegations of industrial fabrics price-fixing did not prejudice the jury against Defendants is best illustrated by the jury's selective finding that STEVENS had participated in the industrial fabrics price-fixing conspiracy but not in the conspiracy to drive Plaintiffs out of business, whereas CLARK-SCHWEBEL had been found to participate in the conspiracy to drive Plaintiff out of business but not the industrial fabrics price-fixing conspiracy.

Finally, Defendants also seem concerned with certain allegedly prejudicial characterizations of Messrs. SCHWEBEL and CLARK by counsel for Plaintiff [p. 43, CLARK-SCHWEBEL'S Brief]. It is sufficient to note that such characterizations appear almost complimentary in comparison with Defendants' characterizations of Mr. POWRIE, Plaintiff, chief witness, as a "professional deadbeat" [Tr. 56; App.], a "liar" [Tr. 57; App.], a "fleecer" [Tr. 57; App.] and someone who "didn't pay the government" [Tr. 54; App.]. As the Second Circuit recently noted in response to a claim by defendant's counsel that plaintiff's trial counsel had engaged in various prejudicial tactics:

"Admittedly, there was some unfairness on both sides, but even in the courtroom fire is often fought with fire. As much as we abhor such tactics in a trial, it seems to us that here 'the kettle is calling the skillet black'." Elliott v. Maggiolo Corp., (2d Cir., September 12, 1975) Vol. 174 N.Y.L.J. No. 62, p.1-2 (September 26, 1975).

In any event, Defendants' failure to object to Plaintiffs' allegedly prejudicial characterization at trial precludes their raising this objection at this time. <u>Vareltzis</u> v. <u>Luckenbach</u> <u>Steamship Co.</u>, 153 F. Supp. 291 (S.D.N.Y. 1957).

In view of the foregoing, Plaintiffs were well within their rights to pursue in detail the Matter of industrial pricefixing, both for the purpose of establishing damages in their own industrial price-fixing claim, and to establish the likelihood, as evidenced by contemporaneous conduct, that Defendants had engaged in decorative fabrics price-fixing in addition to the industrial price-fixing.

C. THERE WAS NO UNEXPECTED LIMITATION OF DEFENDANTS' SUMMATION.

The most spurious of all Defendants' claims is that which alleges that there was an unexpected limitation placed upon their summation by the Court. This assertion reflects little more than the "sour-grapes" attitude which has permeated the papers of CLARK-SCHWEBEL and BURLINGTON subsequent to the jury's return of a verdict against them and their apparent regret in selecting STEVENS' counsel to act as lead counsel for all Defendants*. The baseless nature of the claim is best expressed by the lower Court which euph-

^{*}As noted in the Opinion of the Court below: "...it had been agreed by the Court and all counsel that Jay H. Topkis, Esq., appearing on behalf of Stevens, would wield the "laboring car" throughout the trial on behalf of all three defendants. One has only to examine the transcript to see that this procedure was followed." [App.] Thus STEVENS' counsel played the dominant role for all Defendants in cross-examining Plainciffs' witnesses, in opening to the jury, in the summation to the jury and alone argued Defendants' motion to dismiss at the end of Plaintiffs' case as well as the rebuttal to Plaintiffs' summation.

emistically characterized the charge that the Court unexpectedly limited the summation of Defendants' BURLINGTON and CLARK-SCHWEBEL as "an egregious distortion of the facts" [App.]. This characterization is borne out by the trial transcript.

The first inquiry by the Court as to the amount of time counsel might require for summation was made on the morning of November 7, 1974 by Judge Tenney. With counsel for all parties present, the Court asked, "How long will your summation be? [Tr. 2004; App.]. In accordance with the procedure adopted throughout the trial whereby Mr. TOPKIS (representing STEVENS) would act as lead counsel on behalf of all three Defendants [App.], Mr. TOPKIS respnded, "I will wait to hear what Plaintiffs have to say". [Tr. 2004; App.]. Neither Messrs. HARDISON (representing BURLINGTON) nor McGANNEY (representing CLARK-SCHWEBEL) had any response. Mr. BURGESS, however, indicated that he believed Plaintiffs' summation could be completed in approximately one hour. [Tr. 2004-05;]. The subject of summation arose again during the App. afternoon session of November 7 - this time before Chief Judge Edelstein, who was sitting in for the absent Julge Tenney in accordance with the stipulation of the parties. Again, Mr. BURGESS indicated he believed Plaintiffs' summation would not consume in excess of one hour. The Court then asked of all counsel for Defendants, "Does anybody object to an hour?" [Tr. 2139; App.] to which Mr. TOPKIS responded, "That's fine for us, your Honor". [Tr. 2140; App.] [Emphasis supplied]. The usual silence of Messrs. HARDISON and

McGANNEY prevailed, indicating their standard concurrence with their designated lead counsel's response. The Court concluded the afternoon session before the jury by commenting "I am not going to hold [counsels' summation] to the precise minute..."

[Tr. 2140; App.].

Summation commenced on Monday, November 11, 1974 when, according to Defendants, they first became aware of the alleged "rush to complete summations and charge". [p. 47, CLARK-SCHWEBEL Brief]. Judge Tenney's comment later in the day, however, belies any such mood of urgency. After summations had been completed he said, "I don't see any purpose in charging the jury now at this late hour, so we will adjourn now to 10 o'clock tomorrow morning" [Tr. 2324; App.]. If, as Defendants so adamantly contend, Judge Tenney was in a rush to turn the case over to the jury so as to avoid the necessity of his presence in Court the next day, he most certainly would not have so casually decided to release the jury until the following morning. Since the Court had apparently already concluded that it would not charge the jury that day, and Judge Tenney presided the next day, the alleged "haste" and "urgency" of Judge Tenney obviously had nothing to do with the Court's keeping the summation of all parties within reasonable bounds.

The colloquies between Judge Tenney and defense counsel clearly substantiate the Court's conclusion that not only did Defendants' counsel not request additional summation time, but that when it was offered to them, only Mr. TOPKIS took advantage of it. Par-

ticular attention is warranted to the brief exchange between the Court and defense counsel immediately prior to the luncheon break on Monday, November 11th. Mr. TOPKIS had just completed the major portion of his summation when he inquired of the Court:

"Your Honor, would it be appropriate at this point to take our luncheon recess?

The COURT: Are the other defendants going to sum up too?

Mr. HARDISON: Briefly."* [Tr. 2207; App.].

Mr. McGANNEY made no response to the Court's inquiry. When Mr. TOPKIS then requested an additional 25 minutes in order to complete his summation, the Court obliged by recessing for lunch in accordance with Mr. TOPKIS' request and thereafter allowing him to continue his summation to conclusion. The elapsed time for Mr. TOPKIS' summation was in excess of one hour and a half. After Mr. TOPKIS' lengthy summation on behalf of all Defendants, Messrs. HARDISON and McGANNEY gave their supplementary summations. During this time, the following colloquies occurred.

With respect to Mr. McGANNEY:

"The COURT: I will give you about two minutes more.

Mr. McGANNEY: Your Honor I just then would like to say one thing, just about the quality disputes, as Mr. TOPKIS suggested I might mention it." [Tr. 2235; App.].

With respect to Mr. HARDISON:

"The COURT: I am going to have to bring this to a close.

Mr. HARDISON: I am almost through." [Tr. 2248; App.].

^{*}As noted in CLARK-SCHWEBEL'S Brief In Support Of The Motion For Judgment NOV, CLARK-SCHWEBEL and BURLINGTON took "...approximately 10 or 15 minutes apiece...".

One additional excerpt from the court record demonstrates the groundless nature of Defendants' claims. At the conclusion of Plaintiffs' summation, after Defendants' counsel's summations were allegedly unexpectedly limited, Judge Tenney gave Defendants the unusual opportunity of a rebuttal summation. [Tr. 2322; App.]. While all defense counsel were afforded the opportunity to make additional comments again, only Mr. TOPKIS, on behalf of all Defendants, responded, saying "Under five minutes. I will make it three". [Tr. 2323; App.].

It is evident from the foregoing that counsel for Defendants were given every opportunity to fully present their case in summation. At no time did either counsel for CLARK-SCHWEBEL or BURLINGTON object to the alleged limitation of their summations, request a side bar conference, or take the opportunity offered them during Defendants' rebuttal to Plaintiffs' summation to expand upon those matters they were allegedly precluded from raising during summation. Moreover, by failing to timely object to the Court's alleged limitation upon their summation, Defendants waived the right to raise any objection thereto. F.R.C.P. Rule 46; Moore's, Federal Practice ¶46.01 et seq., Vol. 5A; See United States v. Heyward-Robinson Co., 430 F. 2d 1077, 1083-85 (2d Cir. 1970), cert. denied 400 U.S. 1021 (1971), and cases cited therein.

The lone substantive case cited by Defendants in support of their claim of prejudice is herring v. New York, 43 U.S.L.W. 5018

June 30, 1975), a criminal case in which defendant's counsel had been totally denied any right to summation whatever. Defendants' reliance upon Herring demonstrates the desperation of their arguments. In any event, it is well established that a Court, in the exercise of sound discretion, may always limit the argument of counsel. Biggs v. Mays, 125 F. 2d 693 (8th Cir. 1942). As was said in Tarwick v. Manhattan Life Insurance Company of New York, 484 F. 2d 535, 538 (5th Cir. 1973), "[A court has] wide latitude and discretion in supervising the time limits, the scope and the extent of argument and summation to the jury" [Citations omitted].

In view of all the foregoing, it is evident that Defendants' claim of prejudice resulting from the supposed limitation of their summation is without foundation either in law or in fact.

CONCLUSION

For the foregoing reasons, the jury's verdict in favor of TEXTURA which is supported in all respects by sufficient evidence, should not be overturned.

RESPECTFULLY SUBMITTED,

REGAN GOLDFARB HELLER WETZLER & QUINN ATTORNEYS FOR APPELLEE 445 Park Avenue
New York, New York 10022
Tel. No. 754-3000

HOWARD BREINDEL
WELLS BURGESS
ROBERT ARONSON
OF COUNSEL

A. CONSPIRING TO DRIVE PLAINTIFFS OUT OF BUSINESS

- 1. Was there a conspiracy between two or more persons or corporations to drive TEXTURA out of business by any or all of the following means:
 - By withdrawing, restricting or reducing the credit terms previously extended to TEXTURA
 - By lowering the quality of the merchandise that any Defendant or Defendants had previously sold to TEXTURA
 - By ceasing to deliver any fabric
 - By refusing to weave any fabric
 - By refusing to sell any fabric
 - By modifying any arrangement under which the goods woven for TEXTURA were held and not invoiced until called for delivery
 - By coercing or forcing TEXTURA to enter into a settlement agreement in connection with disputes it had with CLARK-SCHWEBEL, or
 - By modifying policy regarding the adjustment of quality claims

YES	X	NO

If your Answer is NO, omit Questions 2 through 6 of this Part and go to Part B.

2. If your Answer to Question 1 is YES, which of the Defendants was involved in the conspiracy? Answer YES or NO for each Defendant.

BURLINGTON	YES			
CLARK-SCHWEBEL	YES			
J. B. STEVENS	NO			

3. Was the conspiracy a proximate cause for TEXTURA going out of business?

YES	X	NO

4. If your Answer to Question 1 is YES and your Answer to Question 3 is YES, what damages, if any, did TEXTURA sustain as a result of the conspiracy? Give a dollar amount or "None".

\$531,617.00

5. If your Answer to Question 1 is YES, did Plaintiff POWRIE sustain any damages as a result of the conspiracy which he could not have avoided by using reasonable efforts?

YES	NO	X
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6. If your Answer to Question 5 is YES, what unavoidable damages, if any, did POWRIE sustain? Give a dollar amount or "None".

\$			
2			

B. CONSPIRING TO FIX PRICES ON INDUSTRIAL FIBERGLASS FABRICS

1. It has been stipulated that between 1956 and late 1962 the Defendants fixed prices on first-grade ("firsts") industrial fiber glass fabrics. On June 27, 1960, Glass Fabrics purchased \$448.06 worth of industrial fabric "firsts" from J. P. STEVENS, and on July 15, 1965 and August 25, 1965, TEXTURA purchased a total of \$1,543.27 worth of industrial fabric "firsts" from BURLINGTON.

Had the prices of these particular industrial fabrics been fixed? Answer YES or NO for each of the following:

Industrial fabric purchased by GLASS FABRICS from J. P. STEVENS on June 27, 1970

YES

(b) Industrial fabric purchased by TEXTURA from BURLINGTON on July 15, 1965 and August 25, 1965

YES

If your Answer to (a) and (b) above is NO, omit Question 2 of this part and go to Part C.

- 2. If your Answer to either (a) or (b) of Question 1 of this Part is YES, what damages were sustained as a result of the price-fixing on the particular fabric purchased? Give a dollar amount or "None" for each of the following:
 - (a) Damages sustained by GLASS FABRICS on purchase of industrial fabric from J. P. STEVENS on June 27, 1960

\$22.40

(b) Damages sustained by TEXTURA on purchase of industrial fabric from BURLINGTON on July 15, 1965 and August 25, 1965

\$77.16

C. COUNTERCLAIMS

false re	pres	ent	ny Plainti Lation of ed upon by	any ma	aterial	fact to	entiona o any D	lly made efendan	e a t
	YES				NO_	x			
If the A	nswe	r i	s YES, to	whom	was it	made?			
2. false re	If pres	the	Answer t	o Ques	stion 1	is YES,	, what	was the	
3. made, wh "None".	As at i	to s t	each Defe that Defen	ndant dant's	to who	om the fa	alse re ve a do	present llar am	ation was
	BUR	LIN	IGTON		\$				
	CLA	RK-	-SCHWEBEL						
	J.	P.	STEVENS		\$_				



COURT OF APPEALS FOR THE SECOND CIRCUIT

CARLYE MICHAELMAN, etc.,

Plaintiff-Appellee,

- against -

CLARK-SCHWEBEL FIBER GLASS CORP., ET ANO

Defendants-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

NEW YORK

SS .:

I, James A. Steele

depose and say that deponent is not a party to the action, is over 18 years of age and resides at 310 W. 146th St., New York, N.Y.

That on the 30th

day of October 1975 at 1) White & Case 14 Wall St. N.Y., N.Y.

deponent served the annexed Appellee Brief

2) White & Case for Bergson, Borkland, Margolis and Adler (11 Dupout Circle N.W. Wash., D.C.) at 14 Wall Street, N.Y., N.Y.

the Attorneys in this action by delivering true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this 30th day of October 19

19 15

JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 - 0418950
Qualified in New York County
Commission Expires March 30, 1977